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# In the Supreme Court of the United States

STEVEN O'BRIEN,
Superintendent, Old Colony Correctional Center,
*Petitioner,*

*v.*

MICHAEL O'LAUGHLIN,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

This petition presents the same question for review as the petition for certiorari in *Metrish v. Newman*, No. 08-1401, 2009 WL 1370163 (U.S. May 12, 2009), namely, whether a federal habeas court in reviewing the reasonableness of a state court's application of the sufficiency-of-the-evidence standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979), may rely on a "reasonable speculation" standard to set aside the state court's evaluation of the circumstantial evidence supporting the jury's verdict.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is published at 568 F.3d 287 (1st Cir. 2009). Appendix A. The order of the United States District Court for the District of Massachusetts is unpublished. Appendix B. The Massachusetts Supreme Judicial Court's opinion is published at 446 Mass. 188, 843 N.E.2d 617 (2006). Appendix C. The order of the Court of Appeals for the First Circuit denying panel rehearing and rehearing en banc is published at 577 F.3d 1 (1st Cir. 2009). Appendix D.

## JURISDICTION

The jurisdiction of the federal district court was invoked by the timely filing of a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The federal district court denied the petition, and the Court of Appeals for the First Circuit reversed. The judgment of the court of appeals was entered on June 10, 2009. The First Circuit denied a timely petition for panel rehearing and rehearing en banc on August 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

The statutory provisions involved are 28 U.S.C. § 1254(1); 28 U.S.C. § 2254(d); 28 U.S.C. § 2254(d)(1); and 28 U.S.C. § 2254(e)(1). Appendix E.

## INTRODUCTION

This case presents a pressing issue impacting the core principles of comity and federalism that underlie statutory restrictions on federal habeas review. It also involves the dilution of the *Jackson* standard of review for sufficiency-of-the-evidence claims, particularly where, as here, the jury's verdict rests on circumstantial evidence.

In evaluating sufficiency-of-the-evidence claims on habeas review, deference is due both (1) to the state court's reasonable application of the *Jackson* standard under AEDPA,[1] *see Williams v. Taylor*, 529 U.S. 362, 409-11 (2000), and (2) to the reasonable inferences that the jury could have drawn in reaching its verdict, *see Jackson*, 445 U.S. at 326. Recently, however, the Sixth Circuit, and now the First Circuit, have departed from this settled precedent by holding that a state-court determination that there was sufficient evidence to support a jury's verdict can be set aside when a federal court determines that the conviction is based on "reasonable speculation" as opposed to reasonable inferences. *See O'Laughlin v. O'Brien*, 568 F.3d 287, 302 (1st Cir. 2009) ("*O'Laughlin III*"), Appendix A; *Newman v. Metrish*, 543 F.3d 793, 796 (6th Cir. 2008), *petition for cert. filed, Metrish v. Newman*, No. 08-1401, 2009 WL 1370163 (U.S. May 12, 2009).

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[1] The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2254(d).

The "reasonable speculation" standard has no basis in this Court's precedents and is contrary to the fundamental principles of comity and federalism underlying AEDPA's stringent restrictions on federal habeas review. It invites federal habeas courts to second guess the reasoned judgment of state appellate courts, and, equally troubling, to override the reasonable inferences that the jury could have drawn from the evidence presented at trial. The need for adherence to AEDPA's restrictions is especially strong in sufficiency-of-the-evidence cases, where double jeopardy bars the state from retrying a successful habeas petitioner.

## STATEMENT OF THE CASE

1. On the morning of November 17, 2000, the victim, Annmarie Kotowski, was found in her apartment severely beaten, having suffered fifteen to twenty blows that broke nearly every bone in her face and skull. *Commonwealth v. O'Laughlin*, 446 Mass. 188, 190, 198, 843 N.E.2d 617, 621, 626 (2006) ("*O'Laughlin II*"). Appendix C.[2] The victim survived, but she had no memory of the attack. *Id.* at 190, 843 N.E.2d at 621.

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[2] The opinion of the Massachusetts Supreme Judicial Court ("SJC") contains a detailed recitation of the evidence. On habeas review, these factual determinations are presumed correct, unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Highlighted here are those facts from which a rational jury could infer guilt. Further facts are introduced as necessary in the statement of reasons for granting the petition.

Respondent Michael O'Laughlin lived two doors away from the victim in the same apartment complex. *Id.* at 191, 199, 843 N.E.2d at 621, 627. As a maintenance worker at the complex, O'Laughlin had a master key to the victim's apartment. *Id.* at 191, 199, 843 N.E.2d at 621-22, 627. The police did not detect any signs of forced entry into the victim's apartment. *Id.* at 194, 843 N.E.2d at 624. In fact, the doors were locked when Mrs. Kotowski was discovered that morning. *Id.* at 193-94, 843 N.E.2d at 623.

Shortly before 2 a.m. on the night of the attack, the victim's upstairs neighbor was awakened by banging and screaming noises and called 911. *Id.* at 192, 843 N.E.2d at 622. The neighbor testified that he did not hear any vehicles enter or leave the area from the time he first heard screaming until the time the police arrived. *Id.* at 192-93, 843 N.E.2d at 622-23. A test conducted by the State Police determined that a person in the victim's apartment would have been able to hear that someone was speaking in the apartment above, but would have been unable to hear what was said. *Id.* at 192 n.3, 843 N.E.2d at 622 n.3.

When the police arrived following the 911 call, they encountered O'Laughlin outside, in 35-degree weather, wearing only boxer shorts. *Id.* at 193, 200, 202, 843 N.E.2d at 623, 627, 629. According to the officers, O'Laughlin was "uneasy and distant," and he avoided eye contact with them. *Id.* at 193, 200, 843 N.E.2d at 623, 627. O'Laughlin told the police that he had been awakened by screaming, but he thought it was an animal trapped in the dumpster, so he had lodged a

stick in the dumpster to allow the animal to climb out. *Id.* at 193, 200, 843 N.E.2d at 623, 627.[3] But the next morning, O'Laughlin claimed that he had been awakened by noise from the arriving police cruisers. *Id.* at 195, 200, 843 N.E.2d at 624, 627. Later, he gave yet another version. *Id.* at 195, 200, 843 N.E.2d at 623, 627.

In fact, all three accounts were lies; O'Laughlin's telephone records indicated that he was awake in his apartment at the time he claimed to be sleeping. *Id.* at 192, 200, 843 N.E.2d at 622, 627. O'Laughlin's last telephone call was just twelve minutes before the neighbor made his 911 call, *id.* at 192, 843 N.E.2d at 622, and there were no other calls until later that morning, after the police had arrived at the scene and an ambulance had transported Mrs. Kotowski to the hospital. *See* Trial Exhibit # 57, filed with the court of appeals as supplemental authority pursuant to Fed. R. App. P. 28(j) on September 18, 2008.

O'Laughlin had spent the evening of the attack drinking and smoking crack cocaine, but eventually ran out of drugs. *O'Laughlin II*, 446 Mass. at 191-92, 199, 843 N.E.2d at 622, 627. He

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[3] O'Laughlin successfully steered the officers away from the building, just two doors away, where the 911 caller and the victim lived. The officers left shortly after their encounter with O'Laughlin, without speaking with the neighbor who had made the 911 call. *O'Laughlin II*, 446 Mass. at 193, 843 N.E.2d at 623. The victim remained, injured and bleeding, in her apartment, until she was discovered by her boyfriend at about 5:45 a.m. *Id.* The victim's boyfriend then notified the police, who were dispatched back to the apartment. *Id.* at 194, 843 N.E.2d at 623.

was eager to obtain more drugs, but he had also run out of money. *Id.* at 192, 199, 843 N.E.2d at 622, 627. O'Laughlin called several drug dealers during the two hours immediately preceding the attack. *Id.* at 192, 199, 843 N.E.2d at 622, 627. Between midnight and two a.m., O'Laughlin made fifteen telephone calls. Tr. 8/54.[4] O'Laughlin, who had previously been inside the victim's apartment, believed that the victim "had money." *O'Laughlin II,* 446 Mass. at 192, 199, 843 N.E.2d at 622, 627.

The morning after the attack, when O'Laughlin was told that someone had been "murdered," he replied, "What do you want me to do about it?" *Id.* at 194, 843 N.E.2d at 624. Later that morning, O'Laughlin went to the police station to be interviewed, but left shortly after without telling anyone that he was leaving. *Id.* at 195, 843 N.E.2d at 624. When he returned, he seemed agitated and lied to the police, as described above. *Id.* at 195, 200, 843 N.E.2d at 624, 627-28.

Following the attack, police discovered an aluminum baseball bat on the ground a short distance from the victim's apartment. *Id.* at 196, 199, 843 N.E.2d at 625, 627. The bat was covered with leaves and debris, but was otherwise "clean." *Id.* at 196, 200, 843 N.E.2d at 625, 627.[5]

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[4] "Tr. [vol.]/[page]" refers to the ten-volume trial transcript, which was filed with the district court.

[5] The Commonwealth performed forensic testing on the bat. As summarized by the SJC:

> Three small reddish brown stains on the bat tested positive for the presumptive presence of blood. One tested positive for human blood.

O'Laughlin's last name was inscribed on the bat, and O'Laughlin later admitted that the bat belonged to him. *Id.* at 196-97, 200, 843 N.E.2d at 625, 627. The surgeon who operated on the victim opined that her injuries "were caused by a long, sturdy, hard, round object, consistent with an aluminum bat like the one that was recovered near the apartment building." *Id.* at 198, 843 N.E.2d at 626.

O'Laughlin consented to a search of his apartment the day after the attack. *Id.* at 195, 200, 843 N.E.2d at 625, 628. During the search, the police alerted O'Laughlin to a red stain on his closet door and asked whether they could take swabbings. *Id.* at 195-96, 843 N.E.2d at 625. O'Laughlin refused and told the police to leave. *Id.* at 195-96, 843 N.E.2d at 625. He then removed the stain with his finger and told the police they could

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> The three stains were swabbed and sent to the deoxyribonucleic acid (DNA) unit for further testing. Because of contamination in the DNA lab, tests consumed all the testable material without yielding results. An additional cutting from tape on the bat's handle from an area where the presumptive presence of blood could still be detected was submitted to the laboratory. A State police DNA analyst obtained human genetic material from the sample indicating two or more donors, with both a male and female possible in the mixture. She concluded that the victim could not be excluded as a contributor and that one in two of any randomly selected individuals "could have been the contributor."

*O'Laughlin II*, 446 Mass. at 197, 843 N.E.2d at 626.

return, explaining that he believed the stain was his own blood, but he was not sure. *Id.* at 196, 200, 843 N.E.2d at 625, 628. That morning, police officers had noticed a "scratch or a dig mark" on O'Laughlin's cheek, a cut on his chin, and a "round, circular bruise" below his left ear. *Id.* at 194-95, 843 N.E.2d at 624.

2. Following a nine-day jury trial in May 2002, O'Laughlin was convicted of four offenses in connection with the attack on Annmarie Kotowski: (1) Burglary and Armed Assault in a Dwelling, *see* Mass. Gen. Laws ch. 266, § 14; (2) Armed Assault in a Dwelling, *see* Mass. Gen. Laws ch. 265, § 18A; (3) Armed Assault with Intent to Murder, *see* Mass. Gen. Laws ch. 265, § 18(b); and (4) Assault and Battery by Means of a Dangerous Weapon, *see* Mass. Gen. Laws ch. 265, § 15A(b).

3. On appeal, a three-judge panel of the Massachusetts Appeals Court concluded that there was insufficient evidence to support the jury's verdicts and reversed O'Laughlin's convictions. *Commonwealth v. O'Laughlin*, 63 Mass. App. Ct. 805, 817-23, 830 N.E.2d 222, 230-35 (2005). The Massachusetts SJC granted further appellate review and—in a unanimous 7-0 decision—concluded that the evidence against O'Laughlin was sufficient to support the verdicts. *O'Laughlin II*, 446 Mass. at 198-205, 843 N.E.2d at 626-31. After rejecting O'Laughlin's other arguments, the SJC affirmed his convictions. *Id.* at 205-11, 843 N.E.2d at 631-35.

4. O'Laughlin's habeas petition pursuant to 28 U.S.C. § 2254 followed. In his habeas petition,

O'Laughlin alleged that: (1) the evidence at trial was constitutionally insufficient to prove his identity as the perpetrator; and (2) the trial court violated his right to present a defense by excluding a handwritten note from evidence that, according to O'Laughlin, supported his third-party culprit defense.[6] After briefing by the parties and a non-evidentiary hearing, the district court denied O'Laughlin's petition. Appendix B. O'Laughlin filed a timely notice of appeal and requested a certificate of appealability ("COA") from the district court as to his sufficiency and right-to-present-a-defense claims. The district court granted a COA with respect to both issues.

5. In an opinion issued June 10, 2009, a panel of the First Circuit concluded that the evidence was constitutionally insufficient to convict O'Laughlin and that the SJC's decision affirming O'Laughlin's convictions was objectively unreasonable. *O'Laughlin III*, 568 F.3d at 308. The First Circuit thus reversed the order of the district court and remanded the case with instructions that the district court order O'Laughlin's unconditional release with prejudice to reprosecution. *Id.* at 309. In light of its holding on the sufficiency issue, the panel did not reach O'Laughlin's remaining claim regarding his right to present a defense. *Id.* at 309 n.27.

6. On June 24, 2009, the Commonwealth filed a petition for panel rehearing and rehearing

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[6] O'Laughlin's petition also included a third claim not relevant to this appeal.

en banc in the First Circuit, which automatically stayed the First Circuit's mandate pending disposition of the petition. *See* Fed. R. App. P. 41(d)(1). On August 7, 2009, the First Circuit denied the Commonwealth's petition for rehearing, over the dissent of Chief Judge Sandra L. Lynch. *O'Laughlin v. O'Brien*, 577 F.3d 1 (1st Cir. 2009) ("*O'Laughlin IV*"). Appendix D.

7. On August 27, 2009, following the filing and disposition of a series of motions for release and counter-motions for a stay, including an application for stay addressed to a single justice of this Court, *see* Docket No. 09A194, the First Circuit issued its mandate. On September 1, 2009, in accordance with an in-chambers opinion of Justice Breyer,[7] the federal district court released O'Laughlin on bail, subject to a number of conditions, including house arrest, electronic monitoring, and periodic reporting to the court's Pretrial Services office, pending a decision from this Court on certiorari.

## REASONS FOR GRANTING THE PETITION

This Court has repeatedly held that habeas review is not intended to result in a federal retrial of state criminal cases. *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007); *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *Bell v. Cone*, 535 U.S. 685, 693 (2002); *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (Opinion of Stevens, J.). Instead, AEDPA

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[7] *O'Brien v. O'Laughlin*, No. 09A194, 2009 WL 2831420 (U.S. August 26, 2009) (Breyer, J., in chambers).

requires federal courts to defer to a state court's application of clearly-established federal law, so long as the state court's decision is objectively reasonable. 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 409-10. Federal habeas courts also must presume the correctness of state-court factual findings, including the reasonable inferences drawn from those facts. 28 U.S.C. § 2254(e)(1); *Parke v. Raley*, 506 U.S. 20, 35 (1992). This deference is warranted "'to further the principles of comity, finality, and federalism.'" *Duncan v. Walker*, 533 U.S. 167, 178 (2001) (quoting *Williams*, 529 U.S. at 436).

Here, the First Circuit overturned a well-reasoned decision of the Massachusetts SJC and substituted its own evaluation of the evidence for the SJC's evaluation of the same evidence. In so doing, the First Circuit exceeded its statutory authority under AEDPA.

In addition, the legal standard applied by the First Circuit to the underlying sufficiency-of-the-evidence question conflicts with the standard established by this Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). In its June 10, 2009 opinion, the First Circuit held that the evidence against O'Laughlin was constitutionally insufficient, stating that "'[a]lthough circumstantial evidence alone can support a conviction, there are times that it amounts to only a reasonable speculation and not to sufficient evidence.' . . . This is such a case." *O'Laughlin III*, 568 F.3d at 302 (quoting *Newman v. Metrish*, 543 F.3d 793, 796 (6th Cir. 2008), *petition for cert. filed, Metrish v. Newman*, No. 08-1401, 2009 WL 1370163 (U.S. May 12, 2009)). This

formulation of the legal standard for sufficiency—which is the subject of another petition for certiorari currently pending before this Court—is inherently contradictory and undermines the established rule that criminal convictions may be based on reasonable inferences drawn from circumstantial evidence.

Moreover, the "reasonable speculation" standard is in direct conflict with *Jackson*'s directive that federal habeas courts preserve the jury's role as factfinder by viewing all of the evidence in the light most favorable to the jury's verdict. As a matter of practical consequence, the standard disfavors the use of circumstantial evidence and places an undue burden on the prosecution to produce direct evidence of a defendant's guilt or face a heightened standard of evidentiary sufficiency.

This erosion of the *Jackson* standard is of no small concern to the administration of justice. A recent study of habeas petitions filed by state prisoners pursuant to AEDPA established that 25 percent of federal habeas petitions in capital cases raised challenges to the sufficiency of the evidence, and 20 percent of federal habeas petitions in noncapital cases included sufficiency claims. Nancy J. King, *et al.*, *Final Technical Report: Habeas Litigation in U.S. District Courts*, Vanderbilt University Law School and National Center for State Courts (2007), available at www.law.vanderbilt.edu.

This Court has already granted certiorari in *Brown v. Farwell*, 525 F.3d 787 (9th Cir. 2008),

*cert. granted sub nom*, *McDaniel v. Brown*, 129 S. Ct. 1038 (2009), in which the petitioner seeks clarification of the sufficiency-of-the-evidence standard applicable on federal habeas review. This Court should likewise grant certiorari in this case, and in *Metrish v. Newman*, to resolve uncertainty about the application of the *Jackson* standard and to prevent federal habeas courts from retrying state criminal cases on collateral review.

### A. This Court Should Grant Certiorari to Prevent Federal Habeas Retrials of State Criminal Cases in violation of AEDPA.

By enacting AEDPA, Congress placed "more, rather than fewer, limits on the power of federal courts to grant writs of habeas corpus to state prisoners." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003); *Garceau*, 538 U.S. at 206-07. These added constraints were intended "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law," *Bell*, 535 U.S. at 693 (citing *Williams*, 529 U.S. at 403-04).

AEDPA prohibits federal courts on habeas review from overturning a state court's reasonable application of clearly-established federal law. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 409-10. Under AEDPA, "an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law." *Williams*, 529 U.S. at 412 (emphasis in original). Thus, a federal court "may not issue the writ simply because that court concludes in its independent

judgment that the state-court decision applied [the law] erroneously or incorrectly." *Id.* at 411; *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam). Rather, the appropriate inquiry is "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. This is a "substantially higher threshold" than de novo review. *Schriro*, 550 U.S. at 473 (citing *Williams*, 529 U.S. at 410).

This Court has repeatedly re-affirmed that § 2254(d)(1) is binding on federal habeas courts and that it forecloses habeas relief where a state court has reasonably applied Supreme Court precedent. *See Uttecht v. Brown*, 551 U.S. 1 (2007) (reversing Ninth Circuit's grant of habeas relief where state court reasonably applied *Witherspoon-Witt* rule to excusal of juror for cause in death penalty case); *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) (reversing Ninth Circuit's grant of habeas relief where state court reasonably determined that defendant was not "in custody" for *Miranda* purposes); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (per curiam) (reversing Sixth Circuit's grant of habeas relief where state court reasonably applied clearly-established federal law in affirming death sentence); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (reversing Ninth Circuit's grant of habeas relief where state court reasonably applied "gross disproportionality" principle to Eighth Amendment claim); *Visciotti*, 537 U.S. at 19 (reversing Ninth Circuit's grant of habeas relief where state court reasonably applied *Strickland* to ineffective-assistance-of-counsel claim); *Early v. Packer*, 537 U.S. 3 (2002) (per curiam) (reversing Ninth

Circuit's grant of habeas relief where "it [was] at least reasonable [for state court] to conclude" that there was no jury coercion); *Bell*, 535 U.S. at 685 (reversing Sixth Circuit's grant of habeas relief where state court reasonably applied *Strickland* to ineffective-assistance-of-counsel claim).

The fact that the First Circuit "purported to decide the case under the deferential standard AEDPA mandates" does not shield its opinion from review by this Court where the result reached clearly violates AEDPA's provisions. *Brown v. Payton*, 544 U.S. 133, 140 (2004). Instead, this Court looks beyond a circuit court's mere invocation of AEDPA's words and evaluates the substance of its decision. *See, e.g., id.* at 147 (reversing grant of habeas relief where "there [was] no basis for [the Ninth Circuit's] conclu[sion] that the [state court's] application of our precedents was 'objectively unreasonable'"); *Visciotti*, 537 U.S. at 25 (reversing grant of habeas relief where Ninth Circuit recognized that § 2254(d) was applicable but "did not observe th[e] distinction [between an incorrect and an unreasonable application of federal law], [and] ultimately substituted its own judgment for that of the state court").

Here, as discussed below, the Massachusetts SJC's application of *Jackson* was objectively reasonable, and the First Circuit "was nowhere close to the mark when it concluded otherwise." *Yarborough*, 541 U.S. at 665. Certiorari is thus appropriate because the First Circuit's decision was contrary to AEDPA, 28 U.S.C. § 2254(d)(1), and this Court's precedents. *See* Sup. Ct. R. 10(c). Intervention by this Court is necessary to prevent

"federal habeas 'retrials'" in sufficiency-of-the-evidence cases and to ensure that O'Laughlin's "state-court convictions are given effect to the extent possible under law." *Bell*, 535 U.S. at 693.

### B. This Court Should Grant Certiorari Because the "Reasonable Speculation" Standard Finds No Basis in this Court's Cases and Threatens to Erode *Jackson v. Virginia*.

In its June 10, 2009 opinion, the First Circuit held that "'[a]lthough circumstantial evidence alone can support a conviction, there are times that it amounts to only a *reasonable speculation* and not to sufficient evidence.'" *O'Laughlin III*, 568 F.3d at 302 (quoting *Newman*, 543 F.3d at 796) (emphasis added). This Court should grant certiorari because the "reasonable speculation" standard, first adopted by the Sixth Circuit and relied on by the First Circuit in this case, finds no basis in this Court's established law. Further, the term "reasonable speculation" is inherently contradictory, it permits reviewing courts to usurp the jury's role as factfinder, and, ultimately, it devalues circumstantial evidence, all in direct conflict with *Jackson v. Virginia*.

#### 1. The "reasonable speculation" standard is not clearly-established law under AEDPA.

As this Court recently reaffirmed, under AEDPA, a federal court may not grant habeas relief based on a state's failure to apply "a specific legal rule that has not been squarely established by this

Court." *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 (2009); *see also Carey v. Musladin*, 549 U.S. 70, 76-77 (2006) (same). The term "reasonable speculation" is not found in *Jackson v. Virginia* or any subsequent Supreme Court opinion. The term first appeared in a 1981 opinion of the Sixth Circuit Court of Appeals, *Fuller v. Anderson*, 662 F.2d 420 (6th Cir. 1981), *cert. denied sub nom*, *Anderson v. Fuller*, 455 U.S. 1028 (1982), and has come and gone in the Sixth Circuit's jurisprudence, appearing most recently in *Newman v. Metrish*, 543 F.3d at 796, upon which the First Circuit relied heavily in this case. The Sixth Circuit's formulation of the *Jackson* standard in *Newman* is itself subject to a petition for a writ of certiorari that is pending before this Court. *See Metrish v. Newman*, No. 08-1401, 2009 WL 1370163 (U.S. May 12, 2009). Before the First Circuit's June 10, 2009 opinion, no other circuit had adopted this language. The "reasonable speculation" test, to the extent it departs from the *Jackson* rule (discussed below), has not been clearly established by this Court and cannot form the basis for a grant of habeas relief. 28 U.S.C. § 2254(d)(1); *Knowles*, 129 S. Ct. at 1419.

### 2. The term "reasonable speculation" is inherently contradictory and permits appellate courts to usurp the jury's role as factfinder.

The "reasonable speculation" standard applied in the instant case not only finds no basis in the Supreme Court's cases, but, as Chief Judge Lynch observed in her dissent from the denial of rehearing en banc, "[t]he 'reasonable speculation'

standard is materially different from the *Jackson* standard in that it prohibits convictions from resting on reasonable inferences drawn from the evidence." *O'Laughlin IV*, 577 F.3d at 4 (Lynch, C.J., dissenting from the denial of en banc review).

Under *Jackson*, "the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." 443 U.S. at 319 (emphasis in original). *Jackson* thus permits jurors "to resolve conflicts in the testimony, to weigh the evidence, and to draw *reasonable inferences* from basic facts to ultimate facts." *Id.* (emphasis added); *see also Schlup v. Delo*, 513 U.S. 298, 330 (1995) (the *Jackson* standard "focuses the inquiry on the power of the trier of fact to reach its conclusion"); *Herrera v. Collins*, 506 U.S. 390, 402 (1993) ("[T]he standard announced [in *Jackson*] . . . does not permit a court to make its own subjective determination of guilt or innocence.") (quoting *Jackson*, 443 U.S. at 318-19); *Wright v. West*, 505 U.S. 277, 296 (1992) (Opinion of Thomas, J.) ("In *Jackson*, [this Court] emphasized repeatedly the deference owed to the trier of fact, and, correspondingly, the sharply limited nature of constitutional sufficiency review."). Here, the standard applied by the First Circuit inappropriately strips jurors of the ability to make a reasonable determination—beyond a reasonable doubt—that circumstantial evidence in a case points to a defendant's guilt.

Moreover, "[t]he term 'reasonable speculation' contains an inherent conflict.

Recognizing that a conclusion rests on speculation suggests that the inferences upon which it is based are unreasonable." *O'Laughlin IV*, 577 F.3d at 4 n.1 (Lynch, C.J., dissenting from the denial of en banc review). Thus, the First Circuit's statement that a jury's "reasonable speculation" cannot amount to sufficient evidence is at best confusing and at worst encourages appellate courts to substitute their independent assessment of the evidence for that of the jury.

A circuit court's gloss on this Court's jurisprudence can stray so far from the underlying standard as to constitute an error of law. *See Lockyer*, 538 U.S. at 75 (holding that the Ninth Circuit erred by defining "objectively unreasonable," as used in *Williams v. Taylor*, to mean "clear error"). In *Lockyer*, this Court observed that the Ninth Circuit's "gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." 538 U.S. at 75. In like manner, the term "reasonable speculation" fails to give proper deference to the factfinder in sufficiency-of-the-evidence cases by conflating reasonable inferences with speculation. This gloss on the *Jackson* standard cannot be permitted to stand, as it "threatens to lead to reversals of state-court criminal convictions whenever a federal court chooses to sit as a jury and set aside the lawful jury's findings of fact." *Anderson v. Fuller*, 455 U.S. 1028 (1982) (Burger, C.J., dissenting from denial of certiorari). "*Jackson* did not authorize such gross interference with the functioning of state criminal justice systems." *Id.*

### 3. The "reasonable speculation" standard devalues circumstantial evidence, unduly disadvantaging the prosecution in domestic and acquaintance violence cases.

In addition to intruding on the jury's role as factfinder, the "reasonable speculation" standard "strongly disfavors circumstantial evidence, contrary to [this Court's] long-standing recognition that a criminal conviction may rest on circumstantial evidence alone." *O'Laughlin IV*, 577 F.3d at 4 (Lynch, C.J., dissenting from the denial of en banc review); *see Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required."); *Holland v. United States*, 348 U.S. 121, 140 (1954) (noting that, in criminal cases, circumstantial evidence is "intrinsically no different from testimonial evidence"). As Chief Judge Lynch noted in her dissent, this "devaluation of circumstantial evidence . . . has sweeping implications," particularly in domestic or acquaintance violence cases, "where the victims, who often have the only direct evidence of their abusers' guilt, are left unable to testify or they recant or refuse to cooperate." *O'Laughlin IV*, 577 F.3d at 4 (Lynch, C.J., dissenting from the denial of en banc review) (citing T. Lininger, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747, 768 (2005) ("Recent evidence suggests that 80 to 85 percent of battered women will recant at some point.")).

Notably, in the majority of cases in which the Sixth Circuit—the only other circuit court to adopt the "reasonable speculation" standard—has applied the standard, it has reversed a state-court determination of a sufficiency claim. *See Newman*, 543 F.3d at 796 (divided panel affirmed grant of habeas relief), *petition for cert. filed, Metrish v. Newman*, No. 08-1401, 2009 WL 1370163 (U.S. May 12, 2009); *Parker v. Renico*, 506 F.3d 444 (6th Cir. 2007) (unanimous panel affirmed grant of habeas relief); *Brown v. Palmer*, 441 F.3d 347 (6th Cir. 2006) (same); *Fuller v. Anderson*, 662 F.2d 420 (6th Cir. 1981) (divided panel affirmed grant of habeas relief), *cert. denied sub nom, Anderson v. Fuller*, 455 U.S. 1028 (1982). *But see Smith v. Romanowski*, No. 07-1578, 2009 WL 1884451 (6th Cir. July 1, 2009) (unpublished) (divided panel affirmed denial of habeas relief, with dissent calling for reversal under "reasonable speculation" standard); *Tucker v. Palmer*, 541 F.3d 652 (6th Cir. 2008) (divided panel reversed district court's grant of habeas relief, with dissent calling for affirmance under "reasonable speculation" standard). The Sixth Circuit's, and now the First Circuit's, dilution of the *Jackson* standard invites federal courts to retry state cases on habeas review, contrary to the deference that *Jackson* and AEDPA demand.

### C. This Court Should Grant Certiorari Because the Instant Case is a Good Vehicle for Clarifying *Jackson*'s Application to Circumstantial Cases and for Re-Affirming AEDPA's Restrictions on Federal Habeas Review.

This case well illustrates the concerns outlined above. It presents an extremely close case on the merits of the underlying sufficiency-of-the-evidence question, as evidenced by the varied court decisions in this matter. However, the very fact that reasonable minds could differ regarding the merits of the underlying constitutional issue makes it clear that AEDPA constrained the First Circuit to deny O'Laughlin's petition for habeas relief. *See Yarborough*, 541 U.S. at 664-65 (holding that AEDPA precluded Ninth Circuit from granting habeas relief where "fair-minded jurists could disagree" over whether the defendant was in custody for *Miranda* purposes).

This Court has observed that "evaluating whether a rule application was unreasonable [under AEDPA] requires considering the Rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* at 664. Here, O'Laughlin's underlying challenge to the sufficiency of the evidence is governed by the standard set forth in *Jackson v. Virginia*, namely, "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319 (emphasis in original). The standard is a general

one, and, accordingly, its application to a specific case "can demand a substantial element of judgment." *Yarborough*, 541 U.S. at 664. Here, even a cursory review of the First Circuit's analysis reveals that it failed to defer to the SJC's reasoned judgments. Simply put, "there [was] no basis for [the First Circuit's] conclu[sion] that the [SJC's] application of [*Jackson*] was 'objectively unreasonable.'" *Payton*, 544 U.S. at 147.

The First Circuit panel first assailed "the evidence that O'Laughlin acted upon a financial motive," calling it "weak at best." *O'Laughlin III*, 568 F.3d at 302. The court emphasized that no items of value were disturbed in the victim's apartment. *Id.* However, the court overlooked the fact that "nothing [was] displaced, *but* the victim's purse was on the floor." *O'Laughlin II*, 446 Mass. at 194, 843 N.E.2d at 624 (emphasis added).

The First Circuit then dismissed the SJC's conclusion that the jury could draw "a reasonable inference that the defendant was frightened off before he could steal anything when he heard the neighbor [speaking on the telephone]," stating that "no rational juror could conclude that the placement of this phone call frightened [the assailant] off given the volume and duration of Mrs. Kotowski's screams." *O'Laughlin III*, 568 F.3d at 302. The court offered no explanation as to why the volume and duration of the victim's screams—which lasted only about thirty seconds before the neighbor called the police, *O'Laughlin II*, 446 Mass. at 192, 843 N.E.2d at 622—renders the SJC's inference unreasonable. Rather, it is a reasonable inference—and thus a required inference under

*Jackson*—that the assailant, upon realizing that the victim's screams had roused a neighbor, would fear that the police could not be far behind. This inference was further supported by a police reenactment of the 911 call, which determined that a person standing in the victim's bedroom could hear footsteps and speaking noises from the apartment above. *Id.* at 192 n.3, 843 N.E.2d at 622 n.3.

The First Circuit further asserted that the savage nature of the beating was "inconsistent" with the purported financial motive for the crime. *O'Laughlin III*, 568 F.3d at 302. The weight of this motive evidence was for the jury to assess. *Jackson* does not permit the panel to substitute its judgment for that of the jury on this issue. It was not irrational for the jury to conclude that O'Laughlin had a financial motive for entering the apartment, to wit, that he needed money to buy more drugs, and that he abandoned that purpose when the attack on Mrs. Kotowski spiraled out of control.

Similarly, the First Circuit attempted to minimize evidence of O'Laughlin's possession of a master key to the victim's apartment, stating that although "one possible inference" is that O'Laughlin used his key to enter the apartment, "several others . . . possessed a master key," and "Mrs. Kotowski could have let someone familiar into her apartment." *Id.* The implication that these other possibilities detract from the sufficiency of the prosecution's evidence is inconsistent with this Court's observation in *Jackson* that the prosecution is not "under an affirmative duty to

rule out every hypothesis except that of guilt beyond a reasonable doubt." 443 U.S. at 326 (citing *Holland*, 348 U.S. at 140).

Moreover, individual pieces of evidence cannot be considered in isolation. The fact that O'Laughlin possessed a key to the victim's apartment becomes much more powerful when considered alongside the fact that O'Laughlin had entered the victim's apartment on a previous occasion and remarked on the value of her possessions. In addition, telephone records showed that O'Laughlin was awake in his apartment—only two doors away from the victim's apartment—just minutes before the victim's upstairs neighbor heard screaming, and the neighbor testified that he did not hear any vehicles enter or leave the area from the time he first heard screaming until the time the police arrived. *O'Laughlin II*, 446 Mass. at 192-93, 199, 843 N.E.2d at 622-23, 627.

The First Circuit also attempted to circumscribe the inferences that could be drawn from the fact that an aluminum bat, consistent with the victim's injuries and bearing O'Laughlin's surname, was found outside, a short distance from the victim's apartment. Although the panel correctly pointed out that "any bat likely would have been consistent with her injuries," *O'Laughlin III*, 568 F.3d at 302, this bat was located only twenty-five yards from the crime scene, and apart from some leaves and debris covering the bat, it was "clean," permitting the jury to infer that the bat had recently been cleaned and had not been outside for a long time. *O'Laughlin II*, 446 Mass. at 196, 200, 843 N.E.2d at 625, 627.

With respect to the consciousness-of-guilt evidence, the court dismissed the importance of this evidence, even while admitting that "the conflicting versions O'Laughlin gave the police as to how he was awoken and his reaction to the police's request to swab his closet door when they were searching his home could be probative evidence linking O'Laughlin to the crime." *O'Laughlin III*, 568 F.3d at 304. According to the First Circuit, "in light of O'Laughlin's concerns that the police would discover his drug use, this evidence was insufficient to serve as the primary basis upon which the jury could rely." *Id.* However, as the SJC correctly noted, O'Laughlin's reaction to the request to swab the stain on his closet door "reflected not merely a general consciousness of guilt, but indicated that [O'Laughlin] feared that the blood stain could be that of the victim, a fear he would have only if he were in fact the perpetrator." *O'Laughlin II*, 446 Mass. at 196, 200, 843 N.E.2d at 625, 628. O'Laughlin also made a statement to a friend, several days after the attack, that "with [my] bad luck whoever the assailant was . . . came in with a Nixon mask and a bat," Tr. 6/186, indicating a knowledge of the crime that only the assailant would have.

The First Circuit also faulted the SJC for citing the bruises and marks on O'Laughlin's face "as evidence from which the jury could infer that an altercation occurred between O'Laughlin and Mrs. Kotowski," stating that "these bruises and marks have minimal, if any, probative force given the fact that they were not even noted by Officers Tierney and Skowron when they were responding to an assault just minutes after the attack." *O'Laughlin*

*III*, 568 F.3d at 304. Yet, in weighing this evidence, a jury could reasonably discount the fact that the two officers observing O'Laughlin under nighttime conditions had overlooked or not understood the significance of the marks, whereas they were immediately apparent, and remarkable, to officers in the light of day when more information was available. Moreover, a jury could infer from the bruises and marks that the victim fought back during the attack, which could have enraged O'Laughlin into added physical violence.

Finally, the First Circuit placed emphasis on the fact that "the prosecution had to rely on circumstantial evidence because no physical or DNA evidence linked O'Laughlin to the attack despite the copious amounts of blood at the crime scene." *Id.* The panel remarked that "[c]onsidering the large amount of blood, it is difficult to fathom how O'Laughlin was able to avoid having any blood or other DNA evidence connect him to Mrs. Kotowski." *Id.*

The First Circuit's characterization of the blood evidence is flawed. A state chemist who processed evidence at the scene testified that all the visible blood at the crime scene was contained in the bedroom. Tr. 6/281-282. According to officers who responded to the crime scene, the blood inside the bedroom was mostly confined "to the carpet and the wall," Tr. 2/199-200, and the bloodstains on the walls were "smears," Tr. 2/243, which were "mostly in the area of the floor or just lower up on the door jams [sic]." Tr. 2/246. Based on this evidence and on photographs from the scene, the prosecution was able to argue in closing

that, despite copious amounts of blood on the floor, there was "hardly any" spatter on the walls. Tr. 9/76-77. Thus, it was reasonable for the jury to infer that most of the blood that the police observed at the scene accumulated while the victim lay bleeding in the hours following the attack, long after the assailant had left. More importantly, since no blood was found on any of the wall-to-wall carpeting in any of the halls or rooms beside the bedroom, nor on either of the doors leading out of the apartment, Tr. 6/281-282, the reasonable inference was that the assailant had little or no blood on him after the attack.

Moreover, to the extent the First Circuit imposed a requirement that the prosecution present physical or DNA evidence to convict O'Laughlin, such a requirement is contrary to the law of this Court and the panel's own recognition that a conviction may rest solely on circumstantial evidence. *O'Laughlin III*, 568 F.3d at 302; *see Desert Palace, Inc.*, 539 U.S. at 100; *Holland*, 348 U.S. at 140.[8]

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[8] In addition, to the extent the panel implied that the prosecution was required to disprove O'Laughlin's theory that the victim's estranged husband committed the attack, *O'Laughlin III*, 568 F.3d at 308 (noting the "compelling third-party evidence"), this is also contrary to *Jackson*, 443 U.S. at 326. Viewing the evidence in the light most favorable to the prosecution means recognizing that the jury could reject O'Laughlin's third-party culprit evidence. *See Schlup*, 513 U.S. at 330 ("[U]nder *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review."). Here, the third-party evidence only established a motive on the husband's part. The other evidence tended to

Perhaps the best indicator that this was a close case, requiring deference to the SJC, is that the First Circuit panel itself was divided as to what aspects of the SJC opinion were unreasonable under AEDPA:

> This is not to say that each of us is convinced that the state court's decision is unreasonable in every respect. But this case comes to us on arguments as presented by the parties. This panel may not be in complete unanimity in all particulars, but we do agree that [O'Laughlin] has the better of the argument with respect to the means evidence introduced by the prosecution at trial.

*O'Laughlin III*, 568 F.3d at 302 n.19. In sum, because "fair-minded jurists" could (and did) differ about whether the SJC's opinion was in error, under AEDPA, the First Circuit was required to defer to the SJC's reasoned judgment and to affirm the district court's denial of habeas relief. *Yarborough*, 541 U.S. at 664-65.

The costs of permitting the First Circuit to bypass AEDPA's restrictions in this case would be extremely high. Habeas review, by its very nature, "entails significant costs." *Engle v. Isaac*, 456 U.S. 107 (1982). "Among other things, '[i]t disturbs the State's significant interest in repose for concluded

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negate his opportunity to commit the crime. *See* Commonwealth's Brief to the SJC, Supp. Ans., Ex. L at 15-17 (summarizing third-party evidence).

litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Wright*, 505 U.S. at 293 (Opinion of Thomas, J.) (quoting *Duckworth v. Eagan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring)). In sufficiency cases such as this, the friction engendered between the state and federal justice systems is intensified by the fact that double jeopardy principles bar retrial of a petitioner granted habeas relief. This exacts a significant toll on the interests of federalism and comity, and it upsets expectations—particularly of victims—in relation to the finality of state-court criminal proceedings.

Moreover, this is not an isolated problem. This Court is currently presented with at least two other cases in which it is claimed that a federal appellate court exceeded its authority on habeas review by overturning a state-court determination of evidentiary sufficiency. *See Newman*, 543 F.3d at 796, *petition for cert. filed, Metrish v. Newman*, No. 08-1401, 2009 WL 1370163 (U.S. May 12, 2009); *Brown v. Farwell*, 525 F.3d at 787, *cert. granted sub nom, McDaniel v. Brown*, 129 S. Ct. 1038 (2009). Certiorari is warranted in this case, as in *Metrish v. Newman* and *McDaniel v. Brown*, to resolve uncertainty about the application of the *Jackson* standard and to prevent federal retrials of state criminal cases in the guise of habeas review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 21, 2009

# APPENDIX

## APPENDIX A

**[Published at: 568 F.3d *287]**

United States Court of Appeals,
First Circuit.

Michael O'LAUGHLIN, Petitioner, Appellant,
v.
Steven O'BRIEN, Superintendent, Old Colony Correctional Center, Respondent, Appellee.

**No. 08-1010.**

Heard Sept. 12, 2008.
Decided June 10, 2009.

* * *

*289 Kenneth I. Seiger, for appellant.

Scott A. Katz, Assistant Attorney General, Criminal Bureau, with whom Martha Coakley, Attorney General, was on brief for appellee.

Before TORRUELLA, BALDOCK,[FN*] and HOWARD, Circuit Judges.

> FN* Of the Tenth Circuit, sitting by designation.

TORRUELLA, Circuit Judge.

On the morning of November 17, 2000, Annmarie Kotowski ("Mrs. Kotowski") was found in her apartment severely beaten and covered in blood. She survived, but could not remember the details surrounding the attack or the person who attacked her. After an investigation, police identified Petitioner-Appellant Michael O'Laughlin as the perpetrator.

A Massachusetts Superior Court jury subsequently convicted O'Laughlin of the following counts: (1) burglary and armed assault in a dwelling; (2) armed assault in a dwelling; (3) armed assault with intent to murder; and (4) assault and battery by means of a dangerous weapon. The Superior Court then sentenced O'Laughlin to 35-50 years on Counts One and Two; 19-20 years on Count 3; and 9-10 years on Count 4, ruling that the sentences were to be served concurrently. The intermediate Massachusetts Appeals Court reversed the judgments holding that there was insufficient evidence to support the verdicts. *Commonwealth v. O'Laughlin,* 63 Mass. App. Ct. 805, 830 N.E.2d 222 (2005) (hereinafter "*O'Laughlin I*"). The Massachusetts Supreme Judicial Court ("SJC") reinstated the judgment reasoning that there was sufficient evidence to support the verdicts. *Commonwealth v. O'Laughlin,* 446 Mass. 188, 843 N.E.2d 617 (2006) (hereinafter "*O'Laughlin II* ").

***290** O'Laughlin filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts on grounds that (1) the SJC's ruling was objectively unreasonable because there was insufficient evidence to support

a guilty verdict and (2) that the SJC violated his constitutional right to present a defense. The district court denied O'Laughlin's petition for habeas relief. After careful consideration, we reverse the judgment of the district court and order the district court to grant the petition.

## I. *Background*

### A. Factual Summary

"We must 'accept the state court findings of fact unless [O'Laughlin] convinces us, by clear and convincing evidence, that they are in error.' " *Lynch v. Ficco,* 438 F.3d 35, 39 (1st Cir. 2006) (quoting *McCambridge v. Hall,* 303 F.3d 24, 26 (1st Cir. 2002) (en banc)); *see also* 28 U.S.C. § 2254(e)(1). We note that the SJC's findings of fact may be "supplemented with other facts from the record that are consistent with the SJC's findings." *Lynch,* 438 F.3d at 39; *see also Healy v. Spencer,* 453 F.3d 21, 22 (1st Cir. 2006). Thus, we recount the facts largely as they were presented in the SJC's opinion.

In May 2000, Mrs. Kotowski revealed to David Kotowski ("Mr. Kotowski"), her husband of over twenty-five years, that she was romantically involved with James Finn. In September 2000, Mrs. Kotowski moved out of her home into the Fox Hollow condominium complex in a neighboring town.[FN1] She resided alone. O'Laughlin, a member of Fox Hollow's maintenance staff, lived two doors down from Mrs. Kotowski. Like other members of the maintenance staff, he possessed a master key to

all the buildings on the property, including a key to Mrs. Kotowski's apartment.[FN2]

> FN1. The SJC indicated a "difficult" marital situation: "Both the victim and her husband characterized their relationship as friendly but strained. (Other witnesses described the husband's attitude as alternating between loving and angry.)" Approximately a week before the attack, she conversed for the first time with her husband about the possibility of getting a divorce. Mrs. Kotowski testified that Mr. Kotowski was "crushed" by the move.
>
> FN2. O'Laughlin had been inside Mrs. Kotowski's apartment at least once previously in September to fix a window, among other tasks.

The SJC noted that O'Laughlin "took some interest" in Mrs. Kotowski prior to the attack. For example, when Mrs. Kotowski's sister was visiting, O'Laughlin stood outside her apartment and asked Mrs. Kotowski if there were "any more good looking women in there[.]" Also, he referred to Mrs. Kotowski five or six times in conversations with acquaintances, citing her "beautiful antique furniture" in her apartment as evidence of her wealth and remarking that he was attracted to her "body type." [FN3]

> FN3. In addition, the SJC states that just days before the attack, one

> acquaintance testified that O'Laughlin had "really scared" Mrs. Kotowski by inquiring "about the window in her apartment." However, once Mrs. Kotowski realized he was on the maintenance staff, she simply walked away.

The day before the attack, O'Laughlin cashed a $457.16 paycheck and made $200 child support payment to his ex-wife. Also, the SJC stated that O'Laughlin was agitated when he was unable to sell his trailer to his neighbor because the neighbor could not come up with $500. The neighbor paid him the next day.

On the night of the attack, the SJC described O'Laughlin as "[n]ervous, jittery, [and] paranoid...." This was "typical behavior when he smoked crack cocaine," which O'Laughlin had done earlier *291 that evening at the home of a friend, Mark Puleri.

As the night wore on, O'Laughlin was "depleted of drugs and most of his cash." At 9:00 or 9:30 p.m. that evening, O'Laughlin, now at home alone, telephoned another friend, Grover Finkle, asking him for a ride to purchase drugs. Finkle, who was at Richard O'Leary's house, had previously smoked crack cocaine with O'Laughlin and knew a drug dealer. Finkle and O'Leary, a taxicab driver, arrived at O'Laughlin's apartment an hour later. However, they soon left without giving O'Laughlin a ride because O'Laughlin was unable to secure money for cab fare.[FN4]

FN4. O'Leary refused to drive unless O'Laughlin provided him with an advance payment.

In the early morning hours of November 17, between 12:10 and 1:43 a.m., fourteen telephone calls were placed to or from O'Laughlin's apartment. The majority of these calls were placed to known drug dealers.

Shortly before 2:00 a.m. George Whittemore, a neighbor living directly above Mrs. Kotowski, awakened to a woman screaming directly below and the sound of "wood hitting wood." According to Whittemore, a carpenter by profession, these sounds lasted for about thirty seconds.

Whittemore dialed 911 at 1:55 a.m. He stayed awake until the police arrived and flashed his apartment lights to indicate his apartment to the police. Between the time he called 911 and when the police arrived, Whittemore did not hear any vehicles arrive or depart from the area. The police later conducted a reenactment of the 911 call. Based on this reenactment, they concluded that a person standing in Mrs. Kotowski's bedroom could have heard Whittemore's footsteps as he walked to the telephone as well as Whittemore's voice, but would have been unable to make out what was being said.

Officers William Tierney and Phillip Skowron arrived six or seven minutes after Whittemore's 911 call. They were unable to find apartment number 202, the apartment reported in the dispatch, because the apartment numbers at

the complex had been recently renumbered. They did not note anything unusual, but observed O'Laughlin walking from the building on a walkway leading from apartment number 19. O'Laughlin was wearing only boxer shorts and Officer Tierney testified that O'Laughlin appeared "impervious" to the near-freezing temperature.

O'Laughlin questioned the officers regarding what had happened and the officers answered that they were responding to a report of a woman screaming. When they asked him if he had heard any screaming, O'Laughlin replied that he had been awakened by screaming, but believed it to be a raccoon trapped in a dumpster.[FN5] O'Laughlin explained that he had placed a stick in the dumpster so that it could escape. Officer Tierney then looked inside the dumpster and saw a stick, but no animal. The SJC noted that during his conversation with the officers, O'Laughlin seemed "uneasy and distant," not making eye contact with them. The police further searched the area, but left after finding nothing suspicious.

> FN5. O'Laughlin's supervisor testified that the complex had been having problems with raccoons getting caught in the dumpster.

Whittemore testified that throughout the night he heard a woman moaning and crying directly below him.[FN6] He also testified that later in the morning, he heard the *292 sound of glass breaking, banging, and a man outside Mrs. Kotowski's apartment calling her name. The man subsequently yelled "Oh, my God."

FN6. Although he heard these sounds, Whittemore did not contact the police again that night.

The man Whittemore was referring to was Mrs. Kotowski's boyfriend, Finn, who had arrived at 5:45 a.m. at Mrs. Kotowski's apartment. On weekdays, Finn routinely joined Mrs. Kotowski for a morning coffee prior to starting his workday. On this particular morning, when Finn knocked on the door, he only heard her say, "Who is it?" in a strange voice. After failing to reach her from a nearby public telephone, Finn testified that he forced open a locked sliding glass rear door. Although the living room appeared to be in order, he found Mrs. Kotowski lying on the floor next to the bed. He testified that "there was just blood everywhere." Finn dialed 911 just before 6:30 a.m. Mrs. Kotowski, who had severe wounds on her head, was taken to Berkshire Medical Center. The police ruled out Finn as a suspect because of his alibi (which they confirmed), his reaction of shock upon discovering Mrs. Kotowski, and his cooperation with the police.

Officers who arrived after Finn's 911 call observed blood in the victim's bedroom on the bed, the pillow, the floors, the walls, and on the door jambs of the bathroom and bedroom. The SJC noted that the crime scene contained " 'quite a bit of blood' that appeared to be 'splatters' on the comforter." Further, the bed rail was dented, with wood splinters on the ground beneath the dent. Officer Skowron testified that everything else was intact as the apartment was neat and nothing was displaced. Mrs. Kotowski's purse was on the floor,

however. Officer Skowron also testified that there were no signs that the front door or the rear sliding door had been forced open (which contradicted a report by an earlier officer on the scene stating that the rear door was broken); that the drawers were closed; and that the light and figurines on the dresser were upright. Mrs. Kotowski testified that no items of value were missing from the apartment. These items, which were in plain view on top of the dresser, included diamonds, pearls, and an expensive watch in the bedroom. Also, Mrs. Kotowski's purse contained her credit cards, about $28 in cash, and a checkbook. There was $522 in cash in a dresser drawer.

Constance Cappel, a neighbor who lived in the apartment between O'Laughlin and Mrs. Kotowski, testified that she heard voices outside Mrs. Kotowski's apartment at about 6:45 a.m. Cappel went outside and saw Mrs. Kotowski being loaded into an ambulance. She knocked on O'Laughlin's door and told him that she thought someone had been murdered. O'Laughlin, who answered the door in his boxer shorts and looked like he had just awoken, responded "What do you want me to do about it?"

At 8:45 a.m. O'Laughlin came out of his apartment dressed for work, approached one of his co-workers and Cappel, and inquired about what was happening. After his co-worker explained the situation, O'Laughlin described his encounter with the police the previous night and how he had been awakened by the police cruisers. O'Laughlin also informed his co-worker that he told the police that

he thought raccoons had been in the dumpster making a "kind of squealing sound."

At about 9:40 a.m., Officers Tierney and Todd Briggs talked with O'Laughlin outside the apartment building and Officer Tierney noticed a "scratch or a dig mark in [O'Laughlin's] left cheek, [a] small cut on his chin and a round, circular bruise ... just below his left ear." Officer Tierney was unsure about how fresh these marks were.

The SJC remarked that although O'Laughlin was initially "reluctant," he *293 agreed to give a statement at the police station when informed that Officer Tierney would conduct the interview. O'Laughlin arrived at the station at 10:40 a.m., but was told by Chief Ronald Glidden to wait for Officer Tierney, who had yet to arrive. Officer Tierney arrived twenty minutes later and told O'Laughlin that he would be "right with him." However, when he returned five minutes later, O'Laughlin had left.[FN7]

> FN7. O'Laughlin's co-worker testified that O'Laughlin went back to the apartment complex and told him the person O'Laughlin was supposed to meet was not there. After discussing the matter further, O'Laughlin decided to go back to the police station accompanied by his co-worker.

O'Laughlin returned to the police station twenty minutes later and was interviewed by Chief Glidden for about ten minutes. Chief Glidden testified that O'Laughlin "seemed agitated" during

the interview. In his statement to Chief Glidden, O'Laughlin stated that he had been "drinking before he went to bed and he just didn't think he was awake until he heard the cruisers at approximately two o'clock." He thought he may have heard foxes or raccoons before that, but was uncertain. O'Laughlin said that he had "seen [the victim] around,"; that he and a friend had joked about her boyfriend; and that he had been in that apartment to repair a window. After the interview concluded, he went home.

State Troopers David Buell and Brian Berkel arrived at the complex around noon. Trooper Buell spoke to O'Laughlin, who stated that he had been out with his friend, Puleri, the previous night, returned at 10:30 p.m., went to sleep around 11:30 p.m., and was awakened by screaming, which he thought was a fox fighting with a raccoon. O'Laughlin said that a short time later the police arrived and he went out to speak with them. After the officers left, he slept until 7:30 a.m., when he was awakened by his neighbor, who had informed him that there had been a murder.

Trooper Buell asked O'Laughlin for consent to search his apartment in order to eliminate him as a suspect and because his apartment was in close proximity to Mrs. Kotowski's apartment. O'Laughlin consented, and allowed Trooper Berkel to take photographs and two police chemists to search for blood stains. Trooper Berkel photographed a red stain on a closet door near the kitchen area. A chemist who saw the stain asked O'Laughlin if his consent included taking swabbings. O'Laughlin responded that it did not.

Soon thereafter, O'Laughlin asked the officers to leave his apartment.

Outside the apartment, the police decided to apply for a search warrant. They returned to O'Laughlin's apartment and informed him of their intent to secure the apartment and obtain a warrant. O'Laughlin replied that they did not need to pursue a warrant because he would allow them back into the apartment. He also told the officers that he had wiped the red stain off the closet door with his finger, and thought it was his own blood, but was not certain. O'Laughlin told the police that he was concerned about a search because he was afraid police would find his drug paraphernalia and because he possessed money that he did not want taken. Trooper Buell asked O'Laughlin to give him the drug paraphernalia, telling him that he would not be charged with drug possession.

When the chemists returned to the apartment, the red stain on the closet door was gone. However, the area, where the stain had been, tested positive for the presumptive *294 presence of blood. The chemists collected a sample by swabbing.[FN8]

> FN8. Chemists also collected swabs from two small, red-brown stains in the apartment that tested positive for the presumptive presence of blood, and cuttings of what appeared to be blood from O'Laughlin's bed comforter. O'Laughlin handed over to the police the clothes he said he wore the

previous night and permitted the chemist to examine his boots.

A state trooper searched the area surrounding the apartment complex with a dog trained to search by scent. The dog found an aluminum bat about twenty-five yards away from a building's dumpster in the woods. It appeared to be covered in leaves and debris, but was otherwise clean. O'Laughlin's name was inscribed on the bat.

On November 20, O'Laughlin called a friend and informed him that he was a suspect in the assault. The SJC noted that O'Laughlin was "upset" while he told his friend that he was "very happy that [Mrs. Kotowski] had survived ... [s]o that she could identify her assailant," but with his bad luck the assailant could have been wearing a "Nixon mask" and entered with a baseball bat.

Later that day O'Laughlin was arrested. While in custody, O'Laughlin told an inmate that although he owned the bat, he last saw it when he moved into his apartment.[FN9]

FN9. At booking, O'Laughlin remarked during his photograph that the mark on his face was a pimple. Trooper Michael Hill thought it was a blemish or an injury.

The police recovered fourteen fingerprints and one palm print from Mrs. Kotowski's apartment, none of which matched those of O'Laughlin.[FN10] In addition, footprint impressions taken at the apartment did not match O'Laughlin's

boots. State Police Lieutenant Brian O'Hara, trained in fingerprint analysis and bloodstain patterns, opined that a blood stain on Mrs. Kotowski's pillow was caused by the transfer of blood from a person's right hand, but the handprint was unidentifiable. He testified that the hand had to have had a significant amount of blood on it, not all of which would have been transferred.

> FN10. Twelve of these prints were identifiable and excluded O'Laughlin; two were unidentifiable; and one was identifiable, but police could not match it to any known prints.

A state police chemist examined the aluminum bat found in the woods. Three small reddish brown stains on the bat tested positive for the presumptive presence of blood, only one of which tested positive for human blood. The three stains were swabbed and sent to the DNA unit for further testing. There was contamination in the DNA lab, and thus the tests consumed all the testable material without yielding results. An additional cutting from tape on the bat's handle, an area where the presumptive presence of blood could still be detected, was submitted to the laboratory. A state police DNA analyst concluded that while Mrs. Kotowski could not be excluded as a contributor, one in two of any randomly selected individuals could have been the contributor. [FN11]

> FN11. Because of the contamination, only the following samples were deemed adequate for further testing: blood on Mrs. Kotowski's bathroom

> floor; a stain on the wall behind O'Laughlin's dresser; and two cuttings from O'Laughlin's comforter. Of these samples, it was concluded that all of the blood found in O'Laughlin's apartment belonged to him, and O'Laughlin was excluded as a possible contributor to the sample of blood taken from Mrs. Kotowski's bathroom.

A surgeon who performed reconstructive surgeries on Mrs. Kotowski after the attack testified that she had sustained between fifteen to twenty blows that broke *295 nearly every bone in her face and skull. The only exception was her jaw. She also had defensive wounds on her hands caused by five to ten blows. The surgeon gave an opinion that Mrs. Kotowski's injuries were caused by a long, sturdy, hard, round object, consistent with an aluminum bat that was recovered in the woods on the day of the attack.

**B. Procedural History**

In December 2000, A Berkshire County grand jury charged O'Laughlin with four offenses: (1) burglary and armed assault in a dwelling, *see* Mass. Gen. Laws ch. 266, § 14; (2) armed assault in a dwelling, *see* Mass. Gen. Laws ch. 265, § 18A; (3) armed assault with intent to murder, *see* Mass. Gen. Laws ch. 265, § 18(b); and (4) assault and battery by means of a dangerous weapon, *see* Mass. Gen. Laws ch. 265, § 15A(b).

Following a nine-day jury trial in May 2002, O'Laughlin was convicted of all four charges. O'Laughlin appealed.

**1. The Massachusetts Appeals Court Opinion**

On appeal, the Massachusetts Appeals Court concluded that there was insufficient evidence to support the jury's verdicts. The Appeals Court stated that while the government's evidence demonstrated that O'Laughlin had a motive of robbery, an opportunity to commit the crime, a means to commit the crime, and a consciousness of guilt, the evidence was not enough to establish guilt. The Appeals Court concluded that "[n]othing in the record sufficiently links the defendant to the crime to permit the conclusion beyond a reasonable doubt that he was the perpetrator" and that "[p]iling inference upon inference does not amount to proof beyond a reasonable doubt." *O'Laughlin I*, 830 N.E.2d at 231-32. In reaching its conclusion, the Appeals Court noted that the bat was only "consistent" with the weapon used in the attack; that O'Laughlin's lies to the police concerning his whereabouts and his removal of the stain from his closet door, "while certainly permissible to show a guilty conscience, cannot fill the gap in the proof of identity"; that O'Laughlin did not show physical strain in his appearance and demeanor when confronted by the police just about twelve minutes after the attack, which would have been consistent with someone who had just committed such a "brutal" attack; and that the third-party culprit evidence in this case detracted from the government's case. *Id.* at 232-34. Thus, the Appeals

Court reversed O'Laughlin's convictions and directed that judgments be entered in his favor.

**2. The SJC Opinion**

The Commonwealth then sought and received further appellate review from the SJC. The SJC concluded that the evidence against O'Laughlin had been sufficient and affirmed his convictions, stating that circumstantial evidence of motive, opportunity, means, and consciousness of guilt "permissibly convinced the jury of the defendant's guilt." *O'Laughlin II*, 843 N.E.2d at 627.

The SJC stated that the jury could permissibly find that O'Laughlin's motive to break into Mrs. Kotowski's apartment was robbery. *Id.* It pointed to the fact that O'Laughlin had taken drugs twice previously on the night of November 16, had "run out" of drugs and money, and was calling around as late as 1:43 a.m. to purchase drugs, which the SJC noted was "only twelve minutes before the victims' upstairs neighbor telephoned the police department to report screams and banging sounds from downstairs." *Id.*

The SJC further noted that O'Laughlin had previously entered the victim's apartment ***296** and "had reason to believe that she was wealthy and might have cash or valuables." *Id.* The SJC commented that O'Laughlin "needed money immediately and the victim was a nearby and likely source." *Id.* Accounting for the fact that nothing was taken from the apartment, the SJC pointed to a reenactment during trial

demonstrating that the neighbor could be heard in the apartment below when he called the police. The SJC concluded that "[i]t is a reasonable inference that the defendant was frightened off before he could steal anything when he heard the neighbor speaking." *Id.* at 627 n. 11.

The SJC also concluded that O'Laughlin had the opportunity to commit the crime because he resided only two apartment doors away from Mrs. Kotowski and that he had a master key which gave him access to her apartment. *Id.* at 627. In addition, the SJC pointed to Whittemore's testimony that he did not hear any cars going to or from the apartment complex in the interval between when he first heard the screaming and when the police arrived. *Id.*

The SJC also reasoned that O'Laughlin had the means to commit the crime by stating that the aluminum bat was found a short distance from Mrs. Kotowski's apartment complex. *Id.* The SJC stated that "[t]he jury would certainly be warranted in concluding that the bat was the defendant's." *Id.* The SJC explained that "[h]is surname, not a common one, was visible on the bat handle and he mentioned to someone in jail that he was the owner of the bat the police had found." *Id.* The SJC further noted, however, that although the bat was covered by some leaves and debris, it was otherwise "clean" when discovered. *Id.* It also acknowledged O'Laughlin's statement that he had not seen the bat since the day he had moved into his apartment. *Id.* at 627 n. 12.

Most notably, the SJC indicated the significant evidence pointing to O'Laughlin's consciousness of guilt. *Id.* at 627. First, the SJC referenced O'Laughlin's demeanor when the police first arrived on the scene and discovered O'Laughlin outside in his "boxer shorts in near freezing temperature." *Id.* The SJC noted that when he talked with the police, he was "uneasy and distant" and did not make eye contact with the police officers. *Id.* Also, the SJC remarked that the differing versions O'Laughlin gave to police as to the reason he woke up was indicative of his untruthfulness.[FN12] *Id.* at 627-28. The SJC further noted that O'Laughlin reluctantly participated in an interview with the police and seemed "agitated" when he spoke with them. *Id.* at 628.

> FN12. The SJC stated that O'Laughlin lied to the police when he told them that he was awakened by the screaming, but his telephone records show that he was making phone calls until twenty minutes before the police arrived on the scene. He later told the police that the police cruisers woke him up. Also, he told the police in an another interview that he went to bed at 11:30 p.m., awoke to screaming that he believed were animals fighting, went back to sleep and awoke to his neighbor's knock on his door who was there to inform O'Laughlin that Mrs. Kotowski was severely beaten. *Id.* at 627-28.

Moreover, the SJC pointed to O'Laughlin's reaction to the police's request when they asked for a swabbing of the red stain in the closet door of his apartment. *Id.* Although O'Laughlin later allowed the police to return, the stain was gone and O'Laughlin admitted to having removed it with his finger, saying that he believed that it was his own blood. The SJC concluded that "[t]his evidence reflected not merely a general consciousness of guilt, but indicated that the defendant feared that the blood stain could be that of the ***297** victim, a fear he would have only if he were in fact the perpetrator." *Id.*

Finally, the SJC pointed to the fact that O'Laughlin had "a 'scratch or dig mark' on his cheek, a small cut on his chin and a bruise on his neck." *Id.* While acknowledging that the police officer could not discern whether the marks were "fresh," the SJC concluded that "it could be inferred that the injuries were sustained during a physical encounter with the victim." *Id.*

In sum, the SJC stated that the evidence taken together "was sufficient to permit the jury to determine beyond a reasonable doubt that the defendant was the perpetrator of the vicious attack on the victim." *Id.*

In reversing the lower appellate court decision, the SJC distinguished its case law in *Commonwealth v. Mazza,* 399 Mass. 395, 504 N.E.2d 630 (1987), stating that in the instant case the prosecution "presented more evidence linking [O'Laughlin] to the assault." *O'Laughlin II,* 843 N.E.2d at 629. Furthermore, the instant case

contained evidence of means as represented by the aluminum bat, "significantly stronger evidence of consciousness of guilt," bruises on O'Laughlin's face, and the fact that O'Laughlin was wearing only boxers when the police found him, which "would be consistent with his having disposed of bloody outer garments." *Id.* With respect to O'Laughlin's attire, the SJC added that "[t]he jury could find that, had the defendant gone outside to check for animals in the dumpster (as he claimed), it was implausible that he would have done so without putting on at least minimal clothing, not only for purposes of protection against the cold but also for purposes of decency." *Id.*

The SJC disagreed with the weight placed by the Appeals Court on the fact that O'Laughlin "did not manifest any signs of recent physical exertion (sweat, shortness of breath, wet hair or disarray)" twelve minutes after the attack. *Id.* at 629 n. 13. The SJC stated that this did not detract from the government's case because twelve minutes after the attack there would be no reason for O'Laughlin to show signs of this physical exertion. *Id.*

Also, the SJC disagreed with the Appeals Court that the third-party culprit evidence presented in this case detracted from the government's argument or affected the sufficiency of the evidence because it was not "so overwhelming that no rational jury could conclude that the defendant was guilty." *Id.* at 630. The SJC stated that the third-party culprit evidence "simply tended to contradict the Commonwealth's evidence; it did not show it to be incredible or conclusively

incorrect." [FN13] *Id.* (internal quotation marks omitted).

> FN13. The SJC noted O'Laughlin's third-party culprit evidence in a footnote:
>
> > The defense sought to portray the victim's husband, from whom she had recently separated, as the third-party culprit. The husband was aware of the wife's new address and that she was involved with another man. The victim described the husband as being "upset" but not angry about this relationship. Others said the husband alternated between being "nice" and verbally abusive. The husband testified that he was at home at the time of the assault and that he received two telephone calls just before 6 a.m. Each time his "caller ID" indicated the source of the call as the victim's apartment, but no one was on the line. He dialed the number, and a man answered. One witness thought he saw the husband's car in his workplace parking lot at approximately 6 a.m. on the morning of the attack, but a neighbor saw the husband's car parked at home at 6:20 a.m. The husband was generally cooperative with the police, but did not permit the police access to "personal"

> letters to his wife. Tests indicated the presumptive presence of blood on one of the husband's forearms on the day of the attack. On the evening of November 17, the police observed garbage bags on the floor of the husband's garage and dark clothing in a clothes dryer. Two wet towels strongly smelling of bleach were found in a plastic bag in the trunk of the husband's car. One of the towels was the same as towels found in the victim's linen closet. The husband explained that the towels smelled because he did not know how to do laundry and had used too much bleach on them. He said he brought them on a hunting trip the previous weekend and had forgotten them in the trunk. Finally, the husband kept wooden baseball bats and other athletic equipment in his garage.

*Id.* at 630 n. 14.

***298 3. O'Laughlin's Habeas Petition**

In his habeas petition before the district court, O'Laughlin alleged that (1) the evidence at trial was insufficient to prove that he was a perpetrator of the offenses for which he was convicted; and (2) the trial court violated his right to present a defense by excluding a handwritten note that, according to O'Laughlin, supported his third-party culprit defense. After briefing by the

parties and a non-evidentiary hearing, the district court denied O'Laughlin's petition reasoning that "like the courts that have looked at this cold record before me, this is a close question. But the petition must be under federal law denied."

O'Laughlin then filed a timely notice of appeal and requested a Certificate of Appealability ("COA") as to his sufficiency and right-to-present a defense claims. The district court granted a COA with respect to both issues.

## II. *Discussion*

### A. Standard of Review

We review *de novo* the district court's decision to grant or deny a habeas petition under 28 U.S.C. § 2254. *Healy*, 453 F.3d at 25. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, § 104, 110 Stat. 1214, 1219 (1996), a federal court shall not grant a petition for habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the state court decision: 1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or 2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). "A state court's findings on factual issues 'shall be presumed to be correct' and the petitioner bears the burden of disproving factual findings by 'clear and convincing

evidence.' " *McCambridge*, 303 F.3d at 34-35 (quoting 28 U.S.C. § 2254(e)(1)).

Sufficiency claims are generally [FN14] evaluated under § 2254(d)(1) and we look to "whether the state court decision constitutes an unreasonable application of clearly established Supreme Court case law." *Hurtado v. Tucker*, 245 F.3d 7, 15 (1st Cir. 2001) (quoting *Williams v. Matesanz*, 230 F.3d 421, 426 (1st Cir. 2000)).

> FN14. Although an analysis under § 2254(d)(1) is appropriate in the present case, we say "generally" because we need not conclude that we must "evaluate a state court's resolution of a *Jackson* sufficiency-of-the-evidence claim in *all* cases under § 2254(d)(1) rather than § 2254(d)(2)." *Sarausad v. Porter*, 479 F.3d 671, 678 (9th Cir. 2007) (emphasis added), *rev'd on other grounds sub nom. Waddington v. Sarausad*, --- U.S. ----, 129 S. Ct. 823, 172 L. Ed. 2d 532 (2009); *cf. id.* at 695 (Reinhardt, J., concurring in part and dissenting in part) ("I see nothing in law or logic preventing us from evaluating *Jackson* claims under § 2254(d)(2), which authorizes us to grant habeas relief when the state court decision we are reviewing is 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'") (quoting § 2254(d)(2)).

*299 "[T]he 'unreasonable application of' prong of § 2254(d)(1) 'reduces to a question of whether the state court's derivation of a case-specific rule from the [Supreme] Court's generally relevant jurisprudence appears objectively reasonable.' " *Id.* at 16 (quoting *Matesanz*, 230 F.3d at 425).

"Habeas review involves the layering of two standards. The habeas question of whether the state court decision is objectively unreasonable is layered on top of the underlying standard governing the constitutional right asserted." *Id.*

The constitutional right asserted in sufficiency of the evidence claims is set forth by the Supreme Court's decision in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Under *Jackson*, due process requires that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Id.* at 316, 99 S. Ct. 2781. More succinctly, the relevant test we take from *Jackson* is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319, 99 S. Ct. 2781 (emphasis in original).

Thus, for our purposes, we must decide whether the SJC's application of *Jackson* to O'Laughlin's case was "objectively unreasonable." Although "[t]he term 'unreasonable' is no doubt

difficult to define," *Hurtado,* 245 F.3d at 17 (quoting *Williams v. Taylor,* 529 U.S. 362, 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)), we have explained that "some increment of incorrectness beyond error is required." *McCambridge,* 303 F.3d at 36 (quoting *Francis S. v. Stone,* 221 F.3d 100, 111 (2d Cir. 2000)). "The increment need not necessarily be great, but it must be great enough to make the decision unreasonable in the independent and objective judgment of the federal court." *Id.*[FN15] To be sure, "the gap between erroneous state court decisions and unreasonable ones is narrow," *Evans v. Thompson,* 518 F.3d 1, 6 (1st Cir. 2008), and "it will be the rare case that will fall into this gap," *id.* (citing *Williams,* 529 U.S. at 388, 120 S. Ct. 1495). However, for an erroneous decision to be unreasonable, judicial incompetence is not necessary and "a case will fall into this narrow gap precluding relief only when 'it is a *close question* whether the state decision is in error.' " *Id.* at 7 (quoting *McCambridge,* 303 F.3d at 36) (emphasis in original). " 'It is enough if the Supreme Court's general principles can be discerned and if, respectfully but with confidence,' *300 the federal court concludes that the state court unreasonably applied federal law." *Id.* (quoting *White,* 399 F.3d at 25).

> FN15. We also note "that a state-court adjudication of an issue framed in terms of state law may receive section 2254(d)(1) deference so long as the state standard is at least as protective of the defendant's rights as its federal counterpart." *Leftwich v. Maloney,* 532 F.3d 20, 23-24 (1st Cir. 2008); *see also*

> *White v. Coplan*, 399 F.3d 18, 23 (1st Cir. 2005) (explaining that a federal habeas court may "infer that the federal claim was considered if the state court rejects a counterpart state claim and then cites to a case holding that the federal constitution provides no greater protection"). Even though the SJC did not cite *Jackson*, we have no qualms with its analysis in this respect. The SJC relied on Massachusetts case law that has expressly adopted the federal constitutional standard in *Jackson*. *See Commonwealth v. Latimore*, 378 Mass. 671, 393 N.E.2d 370, 375 (1979); *see also Leftwich*, 532 F.3d at 24 ("Because the *Latimore* court adopted the governing federal constitutional standard as the Massachusetts standard for sufficiency of the evidence challenges, ... we can securely reason that in scouring the record for *Latimore* error and finding none the SJC effectively answered the federal constitutional question.") (citations omitted).

Further, in our inquiry of objective unreasonableness the question "is not how well reasoned the state court decision is, but whether the outcome is reasonable." *Hurtado*, 245 F.3d at 20. We note that just because an opinion is poorly reasoned does not "mean that the outcome represents an unreasonable application, although ... it is certainly ground for further

inquiry if the state court ignores material facts." *Id.* (internal citation omitted). "'It is not necessary that the federal court agree with every last detail of the state court's analysis. By like token, state courts are not required to supply the specific reasons that a federal court thinks are most persuasive for upholding the judgment.'" *Healy,* 453 F.3d at 28-29 (1st Cir. 2006) (quoting *Bui v. DiPaolo,* 170 F.3d 232, 243 (1st Cir. 1999)).

As a final note, we emphasize the great degree of deference state court judgments are due, especially those that uphold jury verdicts.[FN16]

> FN16. For example, in *Hurtado,* we explained:
>
> > [A]s a general rule, federal courts should be particularly cautious about issuing habeas, on grounds of the objective unreasonableness of a state court's conclusion that the evidence is sufficient, where there has been a verdict of guilt by a jury of a defendant's peers, where the defendant's credibility was evaluated by the jury hearing his testimony, where that verdict has been affirmed on appeal in the state system, and where there is no claim of constitutional error in the conduct of the trial. Even on direct appeal, claims that the evidence was insufficient to support the verdict are "often made, but rarely successful."

245 F.3d at 19-20 (quoting *United States v. Moran*, 984 F.2d 1299, 1300 (1st Cir. 1993)).

**B. Applicable Law**

**1. The *Jackson* Standard**

Turning to the underlying constitutional right asserted here, O'Laughlin maintains that his due process rights were violated because after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have identified him as the assailant beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. 2781 ("whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.") (emphasis in original); *United States v. Ayala*, 289 F.3d 16, 25 (1st Cir. 2002) ("Identification of the defendant as the person who committed the charged crime is always an essential element which the government must establish beyond a reasonable doubt.") (quotation marks and citations omitted).

"The *Jackson* standard is as easy to articulate as it is difficult to apply." *Newman v. Metrish*, 543 F.3d 793, 796 (6th Cir. 2008); *see generally* Hon. Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. Rev. 979 (1993) (discussing difficulty of defining term); Note, *Reasonable Doubt: An Argument Against Definition*, 108 Harv. L. Rev. 1955 (1995) (same).

This is particularly the case where we have no eyewitness to identify the perpetrator. In cases based on circumstantial evidence such as the instant case,[FN17] "we face head-on the disturbing truth that guilty verdicts rest on judgments about probabilities and those judgments are usually intuitive rather ***301** than scientific." *Stewart v. Coalter,* 48 F.3d 610, 614 (1st Cir. 1995).

> FN17. Like the SJC, we acknowledge that to pass constitutional muster, direct evidence of identification is not necessary. "Identification can be inferred from all the facts and circumstances that are in evidence." *Ayala,* 289 F.3d at 25 (quotation marks and citations omitted).

Despite the lack of precision in determining what constitutes reasonable doubt and the inherent difficulty in defining the term, this court and others have attempted to explicate the standard. For example, we have stated that "[g]uilt beyond a reasonable doubt cannot be premised on pure conjecture. But a conjecture consistent with the evidence becomes less and less a conjecture, and moves gradually toward proof, as alternative innocent explanations are discarded or made less likely." *Id.* at 615-16.

As we have stated on multiple occasions, " '[b]eyond a reasonable doubt' does not require the exclusion of every other hypothesis; it is enough that all 'reasonable' doubts be excluded." *Id.* at 616 (quoting *United States v. Oreto,* 37 F.3d 739, 753 (1st Cir. 1994)); *see also United States v. Dwinells,*

508 F.3d 63, 74 (1st Cir. 2007); *United States v. Olbres*, 61 F.3d 967, 976 (1st Cir. 1995); *United States v. Brown*, 603 F.2d 1022, 1025 (1st Cir. 1979) ("The prosecution may prove its case by circumstantial evidence, and it need not exclude every reasonable hypothesis of innocence so long as the total evidence permits a conclusion of guilt beyond a reasonable doubt.").

We note that although the circumstantial evidence is permissible to discern the identity of the perpetrator, there are some limits to its probative value. "[A] reviewing court should not give credence to 'evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative.'" *Leftwich*, 532 F.3d at 23 (quoting *United States v. Spinney*, 65 F.3d 231, 234 (1st Cir. 1995)); *see also United States v. Valerio*, 48 F.3d 58, 64 (1st Cir. 1995) ("we are loath to stack inference upon inference in order to uphold the jury's verdict"). Further,

> [i]f the evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, this court must reverse the conviction. This is so because ... where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, a reasonable jury *must necessarily entertain* a reasonable doubt.

*United States v. Flores-Rivera,* 56 F.3d 319, 323 (1st Cir. 1995) (alterations, ellipses, and emphasis in original) (internal quotation marks omitted).

Although we give great deference to jury verdicts, we have held that evidence may sometimes be insufficient to sustain a jury verdict of guilt beyond a reasonable doubt. *See, e.g., United States v. García-Torres,* 280 F.3d 1, 6 (1st Cir. 2002) (holding evidence insufficient to show proof beyond reasonable doubt that defendant knew he was aiding in drug conspiracy when participating in kidnapping and murder); *United States v. Blasini-Lluberas,* 169 F.3d 57, 62-64 (1st Cir. 1999) (holding evidence insufficient to support convictions of bank officer on four of five counts of misapplication of bank funds); *United States v. Morillo,* 158 F.3d 18, 24 (1st Cir. 1998) (holding evidence insufficient to support inference of knowledge of conspiracy's purpose); *United States v. Czubinski,* 106 F.3d 1069, 1073-74 (1st Cir. 1997) (holding evidence insufficient to show defendant intended to carry out a scheme to defraud the IRS under wire fraud statute); *United States v. de la Cruz-Paulino,* 61 F.3d 986, 1001 (1st Cir. 1995) (holding evidence insufficient to support conviction for aiding and abetting where prosecution failed to show defendant shared the specific intent of the principal); *Valerio,* 48 F.3d at 65 (holding evidence insufficient to support *302 a finding of intent to distribute cocaine).

C. Analysis of the SJC Opinion

As our sister court has noted, "[a]lthough circumstantial evidence alone can support a

conviction, there are times that it amounts to only a reasonable speculation and not to sufficient evidence." *Newman*, 543 F.3d at 796. This is such a case.

The instant facts may support a reasonable speculation that O'Laughlin was the assailant, but not sufficient evidence to establish his guilt. Taken together, the circumstantial evidence in this case, even when drawing all reasonable inferences in favor of the prosecution, does not permit any rational jury to conclude that O'Laughlin was the assailant beyond a reasonable doubt.

Specifically, the evidence that O'Laughlin acted upon a financial motive to commit the attack is weak at best. A jury could permissibly conclude that he needed money to acquire crack cocaine, giving him reason to break into Mrs. Kotowski's apartment, a person whom he knew had money. However, Mrs. Kotowski testified that nothing of value was taken and no items, not even expensive jewelry in plain view, were disturbed. The SJC accounted for this fact by stating that the jury could draw "a reasonable inference that the defendant was frightened off before he could steal anything when he heard the neighbor [Whittemore] speaking." *O'Laughlin II*, 843 N.E.2d at 627 n. 11. Even if the assailant deduced that the neighbor was calling the police in response to the attack,[FN18] no rational juror could conclude that the placement of this phone call frightened him off given the volume and duration of Mrs. Kotowski's screams. Moreover, the assailant's actions are inconsistent with O'Laughlin's purported financial motive in view of the savage beating Mrs. Kotowski suffered

at the hands of the assailant, an attack involving at least fifteen to twenty blows that nearly broke every bone in her face and skull. If the assailant were motivated by money, a few blows to incapacitate her would have been sufficient.

> FN18. A reenactment demonstrated that the assailant would not have been able to make out that Whittemore was calling the police.

With respect to the opportunity to commit the crime, O'Laughlin had a master key and there were no signs of forced entry; thus, one possible inference is that O'Laughlin used his master key to enter Mrs. Kotowski's apartment. It is notable, however, that several others on the maintenance staff possessed a master key. Also, Mrs. Kotowski could have let someone familiar to her into the apartment.

With respect to the means for the attack, a jury could permissibly find that the aluminum bat found in the woods was O'Laughlin's bat given that his name was on the bat and that he admitted to owning the bat at one time. Yet, there was little evidence connecting the aluminum bat, a non-unique item in a residential complex, to the crime scene apart from the fact that it was found twenty-five yards from the residential complex the following day and the use of such an object was "consistent" with Mrs. Kotowski's injuries.[FN19] Of course, any bat likely would have been consistent with her injuries. Also, Whittemore, a carpenter, testified that he heard "wood hitting wood," as opposed to hearing the *303 sound of a hollow

aluminum bat, when he was awakened. Furthermore, wooden bats were found in Mrs. Kotowski's estranged husband's garage.

> FN19. This is not to say that each of us is convinced that the state court's decision is unreasonable in every respect. But this case comes to us on arguments as presented by the parties. This panel may not be in complete unanimity in all particulars, but we do agree that the petitioner has the better of the argument with respect to the means evidence introduced by the prosecution at trial.

We next turn to O'Laughlin's consciousness of guilt, which the SJC considered the strongest evidence in favor of reinstating the conviction.[FN20] When viewed in context, this evidence is minimally probative on the question of whether O'Laughlin was the assailant.

> FN20. We compare *infra* the consciousness of guilt evidence in our case to that of *Juan H. v. Allen*, 408 F.3d 1262 (9th Cir. 2005). In *Juan H.*, the Ninth Circuit granted habeas relief to a petitioner in part because it viewed that any conclusion regarding the petitioner's guilt based on the prosecution's consciousness of guilt evidence amounted to no more than "bare conjecture." *Id.* at 1277.

Notwithstanding the fact that it was just after 2:00 a.m., the SJC cited to O'Laughlin's "uneasy and distant" demeanor and his unwillingness to look Officers Tierney and Skowron in the eye when they confronted him just minutes after the attack. However, both officers, even though they were responding to reports of a possible assault, did not consider O'Laughlin's behavior suspicious at the time. Indeed, they initially believed he was the reporting party and after asking him a few brief questions they left the area. Even the fact that O'Laughlin was only clad in boxers in near-freezing temperature did not give them pause after he explained to them that he was awakened by animal screams and had gone outside to place a stick in the dumpster, a fact Officer Tierney promptly verified. Also, the SJC explained that a jury could find it "implausible" that O'Laughlin would have gone outside without "putting on at least minimal clothing" if his true reason for going outside was to check for animals. Yet, Officer Tierney stated that O'Laughlin appeared unfazed by the cold and O'Laughlin's alibi shows that he did not intend to stay outside for a very long time.

The other consciousness of guilt evidence cited by the SJC-O'Laughlin's reluctance to be interviewed by the police, the inconsistent versions of how he was awoken, his reaction to the neighbor's report of an assault, the fact that he was agitated during the interview, and his reaction when the police wanted to swab his closet door-while not helpful to his case, are not enough, even when considered in combination with other circumstantial evidence, to allow a jury to

permissibly conclude O'Laughlin's guilt beyond a reasonable doubt.

With respect to this evidence, the fact that O'Laughlin was reluctant to come down to the police station and displayed some agitation during the interview has minimal probative value in determining whether O'Laughlin was the assailant. Although this behavior could indicate consciousness of guilt for some crime, such as possessing crack cocaine (which the evidence shows he admitted to being concerned about), it is an impermissible inferential leap for a jury to find this behavior significantly probative of whether O'Laughlin committed such a brutal attack.[FN21] Likewise, his indifferent reaction to his neighbor informing him of the attack the following morning may bear on whether he was a compassionate person, but has little probative value in assessing O'Laughlin's guilt.

> FN21. This is not a case where the defendant stonewalled the police. He approached the police just minutes after the attack, he submitted to a ten-minute interview with the Chief of Police, and ultimately allowed the police to search his apartment.

*304 Admittedly, the conflicting versions O'Laughlin gave the police as to how he was awoken and his reaction to the police's request to swab his closet door when they were searching his home could be probative evidence linking O'Laughlin to the crime. However, in light of O'Laughlin's concerns that the police would

discover his drug use, this evidence was insufficient to serve as the primary basis upon which the jury could rely to conclude O'Laughlin's guilt beyond a reasonable doubt.

Lastly, the SJC cited bruises and marks on O'Laughlin's face as evidence from which the jury could infer that an altercation occurred between O'Laughlin and Mrs. Kotowski. However, these bruises and marks have minimal, if any, probative force given the fact that they were not even noted by Officers Tierney and Skowron when they were responding to an assault just minutes after the attack.

It bears repeating that the prosecution had to rely on circumstantial evidence because no physical or DNA evidence linked O'Laughlin to the attack despite the copious amount of blood at the crime scene. Considering the large amount of blood, it is difficult to fathom how O'Laughlin was able to avoid having any blood or other DNA evidence connect him to Mrs. Kotowski. Given the insufficiency of the evidence, circumstantial or otherwise, tying O'Laughlin to the attack, we conclude that a rational jury could not find O'Laughlin's guilt beyond a reasonable doubt.

### D. Objectively Unreasonable Standard for Purposes of Habeas Review

Although we have identified several gaps in the SJC's analysis, we are mindful that on habeas review under AEDPA we are not permitted to grant a writ if we merely disagree with the jury verdict or if we identify an error in the SJC's reasoning. The

relevant inquiry is whether the SJC was objectively unreasonable in upholding the conviction.

We once again acknowledge the extremely high bar that must be overcome on habeas review to overturn a state court decision; however, that bar is not insurmountable and on rare occasions we have held a state court decision to be objectively unreasonable. *See, e.g., White,* 399 F.3d at 25 (holding on habeas review that state court unreasonably applied Supreme Court's Confrontation Clause jurisprudence where state court barred petitioner from cross examining complainants regarding prior accusations).

This court has identified certain guidelines that it finds useful in analyzing sufficiency claims on habeas review.[FN22] In addition, we note that although we evaluate the state court decision in light of Supreme Court precedent, we are not precluded from looking at other federal court decisions that may help guide us in applying ***305** the *Jackson* standard. Indeed, " '[d]ecisions from the lower federal courts may help inform the AEDPA analysis to the extent that they state the clearly established federal law determined by the Supreme Court.' " *Evans,* 518 F.3d at 10 (alteration in original) (quoting *Aspen v. Bissonnette,* 480 F.3d 571, 574 n. 1 (1st Cir. 2007)). This is especially true when " 'factually similar cases from the lower federal courts' can 'provid[e] a valuable reference point' when considering the reasonableness of a state court's application of Supreme Court precedent to a particular set of facts." *Id.* (alteration in original) (quoting *Rashad v. Walsh,* 300 F.3d 27, 35 (1st Cir. 2002)). Under § 2254(d)(1),

we are not constrained in our "ability to draw from any legal source in determining whether the state court's decision rests on constitutional error or is an unreasonable application of Supreme Court precedent. [Section 2254(d)(1)] only limits the grounds on which habeas relief may be granted." *Id.*

FN22. These include:

(1) The focus of the inquiry is on the state court decision;

(2) Even with the deference due by statute to the state court's determinations, the federal habeas court must itself look to "the totality of the evidence" in evaluating the state court's decision;

(3) The failure of the state court to consider at all a key argument of the defendant may indicate that its conclusion is objectively unreasonable; however, the paucity of reasoning employed by the state court does not itself establish that its result is objectively unreasonable;

(4) The failure of a state court to give appropriate weight to all of the evidence may mean that its conclusion is objectively unreasonable; and

> (5) The absence of cases of conviction precisely parallel on their facts does not, by itself, establish objective unreasonableness.

*Hurtado*, 245 F.3d at 18.

With this in mind, we look to a recent case, *Newman v. Metrish*, where the Sixth Circuit held a state court ruling to be objectively unreasonable on grounds that the prosecution did not present sufficient evidence to support a prosecution for murder of a known drug dealer. 543 F.3d at 797. In *Newman*, the prosecution presented evidence at trial that the petitioner planned to rob drug dealers for drugs or money; that the victim was a known drug dealer who kept drugs in his freezer; that the petitioner and the victim were known to engage in drug transactions in the past; that the victim's freezer was "open and empty" after he was killed; and that the petitioner had a motive for the killing because he had seen the victim "make a pass" at the petitioner's girlfriend. *Id.* at 794. Furthermore, the prosecution presented evidence supporting an inference that Newman had possessed and once purchased the murder weapon. *Id.* This evidence included forensic evidence and the fact that the petitioner's friend saw a gun similar to the murder weapon in the petitioner's home a few weeks prior to the murder. [FN23] *Id.*

> FN23. With respect to the murder weapon, the *Newman* court acknowledged that "the prosecution offered ample evidence to support an

> inference that [the petitioner] had previously possessed at least one of the murder weapons." *Id.* at 795. However, it noted that "the prosecution did not offer any evidence that [the petitioner] had used or possessed the weapons on the day of the murder," any "eyewitness testimony," any "latent fingerprints from the crime scene or the items in the gym bag" in which the alleged murder weapon was found. *Id.*

In analyzing the evidence under *Jackson,* the *Newman* court stated that even when "consider[ing] all of the evidence in the light most favorable to the prosecution, there remains reasonable doubt because we are limited by what inferences reason will allow us to draw." *Id.* at 797. It remarked that these limitations included its ability to "infer only that [the petitioner] intended to rob a drug dealer and knew that [the victim] was a drug dealer, that a gun previously owned by [the petitioner] was used to kill [the victim], and that a similar looking gun was seen in [the petitioner's] home approximately two weeks before the murder." *Id.* The *Newman* court added that "even assuming that [the petitioner's] gun was indeed the one used in the homicide, there was no evidence of what happened to it between that date and the date of the homicide, and we need not speculate as to what might have happened." *Id.*

The *Newman* court reasoned that while there was "a wealth of information showing that [the petitioner] owned the gun," ***306** "evidence placing

[the petitioner] at the scene" was "conspicuously absent." *Id.* at 797. It pointed to the fact that there was no eyewitness testimony and the police did not recover any fingerprints from the crime scene. *Id.* The *Newman* court stated that "[w]ithout additional evidence placing [him] at the scene of the crime, there is only a reasonable speculation that [the petitioner] himself was present." *Id.* It concluded that "where the evidence taken in the light most favorable to the prosecution creates only a reasonable speculation that a defendant was present at the crime, there is insufficient evidence to satisfy the *Jackson* standard." *Id.* Accordingly, the *Newman* court declared the state court ruling an unreasonable application of clearly established federal law. *Id.*

While *Newman*'s reasoning certainly does not control our analysis, it is significant that our sister court ruled a state court decision to be objectively unreasonable under *Jackson* on facts more probative of a petitioner's guilt than what we have here. For example, O'Laughlin, like the petitioner in *Newman,* was not connected to the crime scene by forensic evidence or eyewitness testimony; however, unlike the petitioner in *Newman* who had prior business dealings with the victim in that case, O'Laughlin had minimal contact with the victim apart from a few casual conversations and a maintenance call. Moreover, the petitioner's robbery motive in *Newman* was consistent with the evidence-as the victim's freezer, which was his storage place for drugs, was open and empty.[FN24] In the instant case, however, O'Laughlin's alleged motive of robbery to satisfy his need for crack cocaine does not align with the fact

that nothing of value was taken from Mrs. Kotowski's apartment or with how savagely she was beaten at the hands of her assailant. Lastly, in *Newman,* the petitioner owned a gun whose spent cartridges and bullets matched those found in the victim's body. Here, the aluminum baseball bat that O'Laughlin owned was merely "consistent" with Mrs. Kotowski's injuries, in the same way a metal pipe or some other long, sturdy object would be consistent with her injuries.

> FN24. Even if, in *Newman,* the petitioner's motive was anger because the victim had made a pass at the petitioner's girlfriend, the victim's gunshot wound is not inconsistent with this motive.

Another decision from a sister court also informs our analysis as to whether the SJC unreasonably applied the *Jackson* standard. In *Juan H. v. Allen,* the Ninth Circuit held that the state court decision was objectively unreasonable because there was insufficient evidence to conclude that a juvenile petitioner aided and abetted a principal in committing first-degree murder and first-degree attempted murder. 408 F.3d at 1278-79.

In *Juan H.,* the state court had concluded that the petitioner had "manifested consciousness of guilt" because he fled from the crime scene; he attempted to leave his home with his family after the shooting; and he gave a false alibi to the police that he was in a trailer and not present during the shooting. *Id.* at 1277. Also, as motive evidence, the

state court cited petitioner's gang gestures towards the victim and the fact that the petitioner had punched the victim on a prior occasion. *Id.*

With respect to the evidence of flight, the *Juan H.* court reasoned that "[n]o reasonable trier of fact could find evidence of criminal culpability in the decision of a teenager to run home from the scene of a shooting, regardless of whether the home was in the same general direction as the car of a fleeing suspect." *Id.* The *Juan H.* ***307** court added that "[l]ikewise, any rational factfinder would find little or no evidence of guilt in the fact that [the petitioner] attempted, along with the rest of his family, to leave his home as it was being surrounded by an angry mob of neighbors." *Id.*

Regarding the false alibi, the *Juan H.* court remarked that it was "bare conjecture" to regard the petitioner's untrue statements to the police as reflective of consciousness of guilt. *Id.* The court explained that the petitioner "might have made a false statement to law enforcement for any number of reasons, especially given that any statements he made as a witness would likely be used to prosecute his older brother, a member of his immediate family." *Id.* The *Juan H.* court stressed: "Although we must draw all reasonable inferences in favor of the prosecution, a 'reasonable' inference is one that is supported by a chain of logic, rather than, as in this case, mere speculation dressed up in the guise of evidence." *Id.*

Finally, the *Juan H.* court stated that the prosecution's motive evidence was mere conjecture, reasoning that the "interpersonal tensions"

between the petitioner and the victim "do not create a sufficiently strong inference of motive to allow a reasonable trier of fact to conclude beyond a reasonable doubt that [the petitioner] had reason to aid and abet first-degree murder." *Id.* at 1278.

The *Juan H.* court maintained that "[s]peculation and conjecture cannot take the place of reasonable inferences and evidence-whether direct or circumstantial-that [the petitioner]-through both guilty mind and guilty act-acted in consort with [the principal]." *Id.* at 1279. Applying the *Jackson* standard to the state court decision, the *Juan H.* court ruled that "only speculation ... supports a conclusion" that the petitioner was guilty of aiding and abetting the first-degree murders. *Id.* It concluded that "[s]uch a lack of evidence violates the Fourteenth Amendment guarantee that an accused must go free unless and until the prosecution presents evidence that proves guilt beyond a reasonable doubt." *Id.* (citing *In re Winship,* 397 U.S. 358, 365-68, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).

Admittedly, the facts in *Juan H.* do not line up precisely with those of the instant case. However, we find instructive the *Juan H.* court's treatment of its consciousness of guilt evidence.[FN25] The *Juan H.* court held that the petitioner's lies about his presence at the crime scene and the fact that he fled the area were insufficient to support an inference that he aided and abetted the murderer, reasoning that a conclusion regarding the petitioner's guilt from this evidence would be no more than "bare conjecture."

> FN25. As we stated above, here the SJC viewed its consciousness of guilt evidence to be most probative of O'Laughlin's guilt.

The evidence in *Juan H.* is far more reflective of consciousness of guilt than what we have here. Unlike the petitioner in *Juan H.*, O'Laughlin was not caught in a lie about whether he was present at the crime scene and did not flee the scene of the crime. In fact, O'Laughlin approached the police just minutes after the attack.[FN26] *308 Similar to the *Juan H.* court's reasoning, this consciousness of guilt evidence constituted "bare conjecture" regarding O'Laughlin's guilt and thus renders the SJC decision that relied primarily on this evidence, objectively unreasonable.

> FN26. As explained above, O'Laughlin's interactions with the police immediately after the assault and the day after, while not irrelevant, did not constitute sufficient evidence for a rational jury, even combined with the other circumstantial evidence, to conclude he was the assailant. Again, it may have been permissible for the jury to find that O'Laughlin possessed consciousness of guilt of some crime, such as drug possession, for which the evidence showed there was some basis, but not of a vicious attack on a neighbor with whom he had very little prior contact.

We reiterate that *Juan H.* and *Newman,* while not controlling, powerfully illustrate how federal courts, acting under the AEDPA regime, can hold in appropriate circumstances state court decisions to be objectively unreasonable when applying *Jackson.* Our sister courts' reasoning in these cases underscore why we believe habeas relief should be granted in the instant case.

Our holding is further bolstered by a post-AEDPA case of our own, *Leftwich v. Maloney,* where a petitioner claimed there to be insufficient evidence for a state court to correctly identify him as the perpetrator of the offense for which he was convicted. *See Leftwich,* 532 F.3d at 21. Although we held that habeas relief was not warranted in *Leftwich,* it is helpful to consider the factors we considered relevant.

In *Leftwich,* the petitioner argued that there was insufficient evidence to conclude that he was a principal rather than an accessory to the murder of a bishop who had taken the petitioner in when he was released from prison. *Id.* In holding that there was sufficient evidence to support a guilty verdict, the *Leftwich* court considered that the petitioner confessed to being in the same place, a ditch, within minutes of when the murder occurred; that the police recovered from the petitioner a Leatherman tool whose length and width were consistent with the victim's wounds; that he "embarked on a wide-ranging cleaning spree" shortly before his arrest; that forensic evidence included fingerprint evidence and the victim's blood on the petitioner's clothes and hands; that the petitioner lied about having any knowledge of the victim's death; that the

petitioner's motive resulted from the victim's disapproval of the petitioner's use of company credit card to satisfy a gambling debt; and that the "record [was] barren of any evidence as to who besides the petitioner could have inflicted the fatal stab wounds." *Id.* at 25-27.

We note the many distinguishing features of the instant case as compared to *Leftwich.* Specifically, unlike the petitioner in *Leftwich,* there was no physical or forensic evidence linking O'Laughlin to the crime scene; O'Laughlin's financial motive was inconsistent with the evidence in Mrs. Kotowski's apartment; and O'Laughlin presented compelling third-party evidence that Mr. Kotowski was the actual assailant. We recognize that the stronger evidence supporting the petitioner's guilt in *Leftwich,* when compared to the present case, is not persuasive by itself to render the evidence insufficient here. However, the fact that the instant facts satisfy very few of the criteria the *Leftwich* court considered relevant in its *Jackson* analysis, provides additional support for our conclusion here that the SJC's decision to reinstate the conviction was objectively unreasonable.

We acknowledge the many strands of circumstantial evidence the prosecution has presented in this case; however, when viewing this evidence in its totality, as we must do on habeas review, that evidence is far from sufficient to establish O'Laughlin's guilt under *Jackson.* Based on the record before us and drawing all reasonable inferences in favor of the prosecution, we hold that it would be overly speculative to conclude

O'Laughlin to be the assailant beyond a reasonable doubt. Accordingly, we conclude that the SJC's decision to uphold O'Laughlin's conviction was objectively unreasonable.

***309 III.** ***Conclusion***

Because double jeopardy principles apply here, we remand to the district court to order O'Laughlin's unconditional release with prejudice to reprosecution. *See Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (holding that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient"), quoted in *Foxworth v. Maloney*, 515 F.3d 1, 2 (1st Cir. 2008). FN27

> FN27. O'Laughlin also claims that the SJC, in concluding that the trial judge properly excluded a note O'Laughlin alleged to have supported his third-party culprit defense, violated his constitutional right to present a defense. In view of our holding regarding O'Laughlin's *Jackson* claim, we need not reach this issue.

***Reversed and Remanded for action consistent with this opinion.***

# APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No: 07-10430-WGY

O'LAUGHLIN
Plaintiff

v.

RUSSO
Defendant

ORDER OF DISMISSAL

YOUNG, D.J.

After a hearing held on 12/11/07 , this Court Orders that Petitioner's, Petition for Writ of Habeas Corpus is DENIED and the above entitled action be and hereby is Dismissed

Sarah A. Thornton
Clerk

/s/ Elizabeth Smith
By: _____
Deputy Clerk

December 12, 2007
Notice mailed to counsel of record.

# APPENDIX C

**[Published at: 446 Mass. *188, 843 N.E.2d **617]**

Supreme Judicial Court of Massachusetts, Berkshire.

COMMONWEALTH

v.

Michael M. O'LAUGHLIN.

Argued Jan. 4, 2006.
Decided March 10, 2006.

* * *

**620 Kenneth I. Seiger for the defendant.

David F. Capeless, District Attorney, for the Commonwealth.

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, & CORDY, JJ.

COWIN, J.

*189 A Superior Court jury convicted the defendant of burglary and armed assault **621 in a dwelling, armed assault in a dwelling,[FN1] armed assault with intent to murder, and assault and battery by means of a dangerous weapon. The

Appeals Court, concluding that there was insufficient evidence to support the verdicts, reversed the judgments. See *Commonwealth v. O'Laughlin*, 63 Mass. App. Ct. 805, 824, 830 N.E.2d 222 (2005). We granted the Commonwealth's application for further appellate review. After careful consideration of the transcripts and arguments of the parties, we determine that, although the question is a close one, ***190** there was sufficient evidence to support the verdicts, and we affirm the convictions.

> FN1. The first two indictments were charged under different statutes, G.L. c. 266, § 14, and G.L. c. 265, § 18A, and there is no allegation of duplicativeness.

Because of its decision on the sufficiency of the evidence, the Appeals Court did not reach the other arguments raised by the defendant. We, however, must do so, and we have concluded that the judge did not act improperly in (1) admitting evidence that the defendant withdrew his consent to allow the police to collect a sample of a small stain found on a closet door; (2) admitting prior bad act evidence regarding the defendant's drug use; (3) denying the defendant a hearing to challenge the reliability of deoxyribonucleic acid (DNA) evidence; (4) ruling inadmissible a handwritten note found in the victim's apartment that allegedly demonstrated a third party's intent to murder; (5) failing to inform the jury in his instruction on armed assault with intent to murder that the Commonwealth had to prove the specific intent to kill; and (6) denying the defendant's motion to dismiss the indictments

because of claimed flaws in the grand jury proceedings. Finally, we have determined that the claim that the prosecutor misstated the evidence in his closing argument does not rise to the level of adequate appellate argument.

1. *Facts.* We summarize the evidence in the light most favorable to the Commonwealth, reserving further details for the discussion of specific issues below.[FN2] On the morning of Friday, November 17, 2000, the victim, Annmarie Kotowski, was discovered in her apartment, severely beaten but still alive. Although she survived, she had no memory of the attack or the weeks following it. The background of that attack, as developed by police investigation, is as follows.

> FN2. The Appeals Court opinion contains a thoughtful and helpful summary of the evidence. *Commonwealth v. O'Laughlin,* 63 Mass. App. Ct. 805, 806-817, 830 N.E.2d 222 (2005).

The victim and David Kotowski were married for over twenty-five years and lived in Dalton. But, in May, 2000, the victim revealed to her husband that she was involved in a romantic relationship with James Finn of Dalton. The marriage became difficult and, in September, 2000, the victim moved out of the marital home. She moved into the Fox Hollow condominium complex in nearby Lee, apartment no. 15, Ecstatic Way, and lived there alone. Her relationship with Finn continued. She first discussed divorce with her husband approximately one *191 week before the

attack. Both the victim and her husband characterized their relationship as friendly but strained. (Other witnesses described the husband's attitude as alternating between loving and angry.)

The defendant, Michael O'Laughlin, also lived in the Fox Hollow condominium complex, in apartment no. 19, two apartments from the victim's. As of November, 2000, the defendant had worked for approximately eighteen months as a member of the condominium complex's maintenance staff. As such, he was one of several Fox **622 Hollow employees with a master key to all of the buildings on the property, including the victim's apartment. He had been inside the victim's apartment in September to perform various tasks and on one occasion had fixed a window.

The defendant took some interest in the victim before the attack. Once, when the victim's sister was visiting, the defendant was outside the victim's apartment and said to the victim, "Wow, have you got any more good looking women in there?" The defendant also mentioned the victim five or six times to acquaintances. He said he thought the victim "had money" because she had beautiful furniture in her apartment, and that she had the thin body type that he found attractive. He told them that he said hello to the victim occasionally, but she ignored him. One acquaintance testified that on November 13, the defendant told her that he "really scared" the victim by asking "about the window in her apartment," though she then realized that he knew about the window because he was the maintenance

man, at which point she ignored him and walked away.

On Thursday, November 16 (the day before the victim was found beaten), the defendant cashed a $457.15 pay check and made a $200 child support payment to his former wife. He also expected to sell a trailer to a neighbor for $500, and seemed agitated when the neighbor failed to come up with the money that day. (The neighbor paid the next day.)

On Thursday evening, the defendant and a friend, Mark Puleri, went to Pittsfield to purchase "crack" cocaine. They smoked the cocaine at Puleri's house. The defendant was "[n]ervous, jittery, [and] paranoid," typical behavior when he *192 smoked crack cocaine. Puleri then drove the defendant back to Pittsfield to buy more cocaine, which they smoked at the defendant's apartment at Fox Hollow. Now, depleted of drugs and most of his cash, the defendant asked Puleri for money to buy beer. Puleri purchased beer at a local store and left the defendant at his apartment with most of the beer.

Around 9 or 9:30 P.M., the defendant telephoned a friend, Grover Finkle, who was at Richard O'Leary's house, to ask for a ride to Pittsfield to buy drugs. Finkle had previously smoked crack cocaine with the defendant and knew at least one drug dealer. O'Leary and Finkle arrived at the defendant's apartment about one hour after he telephoned. O'Leary, who drove a taxicab, refused to drive to Pittsfield unless he was paid in advance, which the defendant was unable to

do. The defendant made some telephone calls in an effort to get cab fare, but Finkle and O'Leary eventually left without giving him a ride.

Between 12:10 and 1:43 A.M. on what was now the early morning of November 17, telephone records show fourteen calls to or from the defendant's apartment. Three calls were made to Finkle's telephone number. Most of the calls, particularly the later ones, were to pagers owned by drug dealers. The last telephone call was made at 1:43 A.M.

Shortly before 2 A.M. on the same morning, George Whittemore, whose bedroom was directly above the victim's, was awakened by banging and screaming sounds coming from the apartment directly below. The screaming was that of a woman's voice, the banging sounded like "wood hitting wood," and the sounds lasted for about thirty seconds. Whittemore dialed 911 at 1:55 A.M. (twelve minutes after the defendant's last telephone call).[FN3] Whittemore **623 stayed awake until he saw police cruisers enter the building's parking lot and he flashed his apartment lights to indicate his apartment for the police, but did not go outside to meet the police. Whittemore did not hear any vehicles *193 come to or leave the area from the time he heard the screaming until the time he saw the police arrive.

> FN3. The State police conducted a test to determine whether a person in the victim's apartment could hear Whittemore make the 911 call by having Whittemore reenact his

> movements in making the call. A State trooper standing in the victim's bedroom below was able to hear Whittemore's footsteps as he walked to the telephone, and was able to hear that he was speaking, but was unable to hear what was being said.

Officers William Tierney and Phillip Skowron of the Lee police department arrived six or seven minutes after Whittemore's 911 call. They sought apartment no. 202, the number reported in the dispatch, but were unable to find it.[FN4] The police did not hear or see anything amiss, but did see Michael O'Laughlin, the defendant, walking from the building on a walkway leading from apartment no. 19.

> FN4. The police later discovered that the number on the inside of Whittemore's door was 202, while a different number appeared on the outside. The apartments had recently been renumbered.

Although the defendant was wearing only boxer shorts, he did not appear affected by the thirty-five degree temperature. He asked the officers what had happened, and was told that there had been a report of a woman screaming. The officers asked if he had heard screaming and the defendant said that he had been awakened by screaming, but thought it was an animal because raccoons had been getting stuck in the dumpster, and he had lodged a stick in it to allow animals to climb out.[FN5] Tierney looked inside the nearby

dumpster and saw a stick but no animals. During this brief conversation, the defendant appeared "uneasy and distant," kept his head down, and did not look directly at the officers. Although the police continued to search the area, they found nothing suspicious and left.

> FN5. The defendant's supervisor confirmed that there had been problems with raccoons in the dumpster.

Whittemore, the neighbor who called 911, heard a woman moaning and crying directly below him several times that night, but he did not contact the police again. Later in the morning, he heard a man outside the victim's apartment calling her name and banging, then eventually the sound of glass breaking, and a man yelling, "Oh, my God." The man was James Finn, the victim's boy friend. Finn usually stopped for coffee before work with the victim at her apartment between 5:30 and 5:45 A.M., on weekday mornings. On November 17, Finn arrived at 5:45 A.M., but the victim did not answer her door when he knocked repeatedly and called out to her. He heard her say, "Who is it?" in an unusual voice. After unsuccessfully trying to reach her from a nearby *194 public telephone, Finn returned and forced open a locked sliding glass rear door. The living area appeared in order, but he found the victim in her bedroom "lying on the floor next to the bed." "[T]here was just blood everywhere." Finn dialed 911 just before 6:30 A.M.[FN6]

FN6. Finn was eliminated as a suspect based on confirmation of his alibi, his shock on discovering the victim, and his cooperation with the police investigation.

The victim, who had severe wounds on her head and hands, was taken to Berkshire Medical Center in Pittsfield. Officers who arrived after Finn's 911 call observed blood in the victim's bedroom on the bed, the pillow, the floors, and the walls, **624 and on the door jambs of the bathroom and bedroom. There was also "quite a bit" of blood that appeared to be "splatters" on the comforter. The bed rail had a small dent and wood splinters were found on the floor directly below the dented portion. The bed clothes appeared as if someone had slept in the bed. Apart from the above, all other items appeared to be intact.

The rest of the apartment was also neat, with nothing displaced, but the victim's purse was on the floor. A State trooper searched the apartment later that day. He did not detect signs of forced entry on either the front door or the rear sliding door that Finn forced open.[FN7] In the victim's purse were her credit cards, about $28 in cash, and a checkbook. There was $522 in cash in a dresser drawer, and several pieces of valuable jewelry, including diamonds, pearls, and an expensive watch, in the bedroom. The victim later indicated that no items of value were missing from her apartment.

FN7. However, the first officer on the scene stated that the door "was indeed

broken as [Finn] indicated." This discrepancy is not material to our discussion.

The woman who lived in the apartment between the victim and the defendant knocked on the defendant's door sometime before 7 A.M. He answered in his boxer shorts, looking as if he had just awoken. When he was informed that someone had been "murdered," he replied, "What do you want me to do about it?"

At about 9:40 A.M., Officers William Tierney and Todd Briggs talked with the defendant outside the apartment building (where he worked during the day). Tierney noticed a "scratch or a dig *195 mark in [the defendant's] left cheek, small cut on his chin and a round, circular bruise ... just below his left ear," but could not be certain how old the marks were. When they asked the defendant to give a statement at the Lee police station, he seemed reluctant, but agreed when told that Tierney would conduct the interview. The defendant arrived at the station at 10:40 A.M., and was told by Chief Ronald Glidden to wait for Tierney, who had not yet arrived. Tierney arrived twenty minutes later, and told the defendant that he would be "right with him." When Tierney returned five minutes later, the defendant was not there.

The defendant returned to the police station about twenty minutes later. Chief Glidden interviewed the defendant for about ten minutes, during which time the defendant seemed agitated.[FN8] The defendant stated that he was

drinking before he went to bed and that the police cruisers woke him at approximately 2 A.M., but that he "didn't think he was awake until he heard the cruisers." He thought he may have heard foxes or raccoons before that, but was uncertain. The defendant said that he had "seen [the victim] around," and that he and a friend had joked about her boy friend. He also said that he had been in that apartment to repair a window.

> FN8. Glidden did not recite the Miranda warnings to the defendant because he was not a suspect at the time.

State Troopers David Buell and Brian Berkel arrived at Fox Hollow around noon. Buell spoke to the defendant, who said that he went to Pittsfield with Mark Puleri the previous night, returned at 10:30 P.M., went to sleep around 11:30 P.M., and was awakened by screaming, which he thought was a fox fighting with a raccoon. He said that a short time later the police arrived and he went out to speak with them. After the officers left, he went back to sleep until 7:30 A.M., when he was awakened by his neighbor's knock on his door.

**625 Buell asked the defendant for consent to search his apartment in order to eliminate him as a suspect due to his apartment's proximity to the victim's. The defendant consented, and also allowed Berkel to take photographs and two State police chemists to look for blood stains. Berkel photographed a red stain on a closet door near the kitchen area. After seeing the stain, a chemist*196 asked whether the defendant's consent included

taking swabbings. The defendant replied in the negative, and shortly afterward, he asked them all to leave his apartment.

Outside the apartment, the police conferred and decided to apply for a search warrant. They immediately returned to inform the defendant of their intent to secure the apartment and obtain a warrant. The defendant said that a warrant was unnecessary because he would allow them back into the apartment. He also told the officers that he had wiped the red stain off the closet door with his finger, and thought it was his own blood, but was not sure. The defendant also stated that he was concerned about a search because he was afraid police would find his drug paraphernalia and he had cash that he did not want taken. [FN9]

> FN9. There was cash in the defendant's dresser, which presumably included the amount his neighbor paid him for a trailer earlier that day. The defendant was paid for the trailer after the time the victim was assaulted and before the police searched his apartment.

The red stain was no longer visible when the chemists returned, but the area where it had been tested positive for the presumptive presence of blood, and a sample was collected by swabbing. Chemists also collected swabs from two small, red-brown stains in the apartment that tested positive for the presumptive presence of blood, and cuttings of what appeared to be blood from the defendant's bed comforter. The defendant gave the police the

clothes he said he wore the night before and permitted the chemist to examine his boots.

A State trooper searched the area around the apartment building with a dog trained to search by scent. The dog located an aluminum bat (characterized as a baseball or softball bat) lying in a wooded area approximately twenty-five yards from the building's dumpster. It appeared to have been covered with some leaves and debris, but was otherwise clean. An inscription of the defendant's last name was on the bat.

A few days after the attack, an "upset" defendant told a friend that he was a suspect in the assault. He said that he was "very happy that [the victim] had survived ... [s]o that she could identify her assailant," but that with his "bad luck," the assailant was probably wearing a "Nixon mask" and came in with a baseball bat. He was arrested later that day. Sometime *197 thereafter, while in custody awaiting trial, the defendant told another inmate that he owned the bat but had not seen it since he moved into his apartment.

In regard to physical evidence, the police recovered fourteen fingerprints and a palm print from the victim's apartment, but none of them matched those of the defendant.[FN10] Footprint impressions at the crime scene did not match the defendant's boots. State Police Lieutenant Brian O'Hara, trained in fingerprint analysis and bloodstain patterns, gave an opinion that a blood stain on the victim's pillow was caused by the transfer of blood from a person's right hand, but was not identifiable. He testified that the imprint

was of **626 a hand about the same size as his own with a significant amount of blood on it.

> FN10. Twelve of these prints were identifiable and excluded the defendant. Two were unidentifiable. One was identifiable, but police were unable to match it to any known prints.

A State police chemist examined the bat. Three small reddish brown stains on the bat tested positive for the presumptive presence of blood. One tested positive for human blood. The three stains were swabbed and sent to the deoxyribonucleic acid (DNA) unit for further testing. Because of contamination in the DNA lab, tests consumed all the testable material without yielding results. An additional cutting from tape on the bat's handle from an area where the presumptive presence of blood could still be detected was submitted to the laboratory. A State police DNA analyst obtained human genetic material from the sample indicating two or more donors, with both a male and female possible in the mixture. She concluded that the victim could not be excluded as a contributor and that one in two of any randomly selected individuals "could have been the contributor."

Due to the contamination, the only samples with sufficient material for further testing after the failed tests were from blood on the victim's bathroom floor, a stain on the wall behind the defendant's dresser, and two cuttings from the defendant's comforter. Of these, all of the blood found in the defendant's apartment was his own,

and the defendant was excluded as a *198 possible contributor to the sample of blood taken from the victim's bathroom.

A surgeon who performed reconstructive surgeries on the victim after the attack testified that she had sustained between fifteen to twenty blows that broke nearly every bone in her face and skull. She also had defensive wounds on her hands caused by five to ten blows. The surgeon gave an opinion that the victim's injuries were caused by a long, sturdy, hard, round object, consistent with an aluminum bat like the one that was recovered near the apartment building.

2. *Sufficiency of the evidence.* The defendant moved for required findings of not guilty at the close of the Commonwealth's case and again at the close of all the evidence. He claims that his motions were improperly denied because the evidence failed to identify him as the assailant. In reviewing the denial of a motion for a required finding, we must determine "whether the evidence, in its light most favorable to the Commonwealth, notwithstanding the contrary evidence presented by the defendant, is sufficient ... to permit the jury to infer the existence of the essential elements of the crime charged...." *Commonwealth v. Latimore,* 378 Mass. 671, 676-677, 393 N.E.2d 370 (1979), quoting *Commonwealth v. Sandler,* 368 Mass. 729, 740, 335 N.E.2d 903 (1975). "Additionally, the evidence and the inferences permitted to be drawn therefrom must be of 'sufficient force to bring minds of ordinary intelligence and sagacity to the persuasion of [guilt] beyond a reasonable doubt.' " *Commonwealth v. Latimore, supra* at 677, 393

N.E.2d 370, quoting *Commonwealth v. Cooper*, 264 Mass. 368, 373, 162 N.E. 729 (1928). Because the defendant moved for required findings at the close of the Commonwealth's case and again at the close of all the evidence, "[w]e consider the state of the evidence at the close of the Commonwealth's case to determine whether the defendant's motion should have been granted at that time. We also consider the state of the evidence at the close of all the evidence, to determine whether the Commonwealth's position as to proof deteriorated after it closed its case." *Commonwealth v. Sheline*, 391 Mass. 279, 283, 461 N.E.2d 1197 (1984).

As the Commonwealth did in this case, it may rely wholly on circumstantial **627 evidence. *Commonwealth v. Degro*, 432 Mass. 319, 325, 733 N.E.2d 1024 (2000). As we view the evidence, the inferences we *199 draw need be only "reasonable and possible," not necessary, inferences. *Commonwealth v. Longo*, 402 Mass. 482, 487, 524 N.E.2d 67 (1988), quoting *Commonwealth v. Casale*, 381 Mass. 167, 173, 408 N.E.2d 841 (1980).

With these principles in mind, we proceed to discuss the evidence that permissibly convinced the jury of the defendant's guilt: evidence of motive, opportunity, and means, as well as consciousness of guilt. See, e.g., *Commonwealth v. Robertson*, 408 Mass. 747, 756, 563 N.E.2d 223 (1990); *Commonwealth v. Montecalvo*, 367 Mass. 46, 55, 323 N.E.2d 888 (1975). The jury could permissibly find that the defendant had a motive to break into the victim's apartment, i.e., robbery. The defendant had purchased crack cocaine on two different occasions on the evening of November 16 and had

been ingesting drugs and beer all night. He had run out of both drugs and money later in the evening and was desperately seeking to obtain more drugs. His telephone records show calls, many of which were attempts to purchase drugs, as late as 1:43 A.M., only twelve minutes before the victim's upstairs neighbor telephoned the police department to report screams and banging sounds from downstairs. The defendant had been in the victim's apartment previously and had reason to believe that she was wealthy and might have cash or valuables. The defendant needed money immediately and the victim was a nearby and likely source. [FN11]

> FN11. The fact that nothing was stolen could be explained by the upstairs neighbor's telephone call to the police. The reenactment indicated that the neighbor could be heard in the apartment below. It is a reasonable inference that the defendant was frightened off before he could steal anything when he heard the neighbor speaking.

The defendant also had the opportunity to commit the crime. He lived in the same apartment complex as the victim, only two doors away. As a maintenance worker, he possessed a master key that provided access to her apartment. Moreover, the victim's upstairs neighbor testified that he heard no vehicles entering or leaving the area from the time he first heard the screaming until the police arrived.

There was also evidence of means. An aluminum bat was found on the ground a short distance from the victim's apartment. The jury would certainly be warranted in concluding *200 that the bat was the defendant's. His surname, not a common one, was visible on the bat handle and he mentioned to someone in jail that he was the owner of the bat the police had found.[FN12] Although covered with leaves and debris, the bat was otherwise clean when found.

> FN12. He said that he had not seen the bat since the day he had moved into the complex. (It is not clear from the record when the defendant moved into the complex.)

The Commonwealth also presented abundant evidence of consciousness of guilt. When the police first arrived at the apartment complex, they encountered the defendant walking outside clothed only in boxer shorts in near freezing temperature. In talking with the police at that time, the defendant appeared "uneasy and distant," never looking at the officers. The defendant lied to the police when he said that he had been awakened by screaming; his telephone records indicate many calls until twenty minutes before the arrival of the police. And he later told the police that he had been awakened by the noise of the cruisers. In another police interview, he gave yet another version: he fell asleep at 11:30 P.M., was awakened by screaming that he believed to be animals fighting, **628 went back to sleep and was awakened in the morning by a neighbor who reported an assault. (The neighbor testified that the defendant's

response to this news was, "What do you want me to do about it?") In addition, the defendant was reluctant to be interviewed by the police, and when he did speak with them, he appeared "agitated."

Perhaps the most significant consciousness of guilt evidence is the defendant's reaction when the police sought a swabbing of a red stain on a closet door in his apartment. Although the defendant had previously consented to a police search of his apartment, he asked the police to leave. He later permitted them to return, but only after he had removed the stain from the door with his finger. He told the police then that, although he was not sure what the stain on the door was, he believed that it was his own blood. This evidence reflected not merely a general consciousness of guilt, but indicated that the defendant feared that the blood stain could be that of the victim, a fear he would have only if he were in fact the perpetrator.

*201 Additional evidence consistent with the defendant's guilt is that at 10 A.M. on the morning of the assault the defendant was observed to have a "scratch or a dig mark" on his cheek, a small cut on his chin and a bruise on his neck. Although the police officer could not be certain whether these marks were fresh, it could be inferred that the injuries were sustained during a physical encounter with the victim.

Contrary to the Appeals Court, we conclude that the above evidence was sufficient to permit the jury to determine beyond a reasonable doubt that the defendant was the perpetrator of the vicious attack on the victim. In reaching its decision, the

Appeals Court relied on *Commonwealth v. Mazza*, 399 Mass. 395, 504 N.E.2d 630 (1987), where, on facts somewhat similar to those here, we held that the evidence was insufficient "to identify the defendant as the perpetrator." *Id.* at 399, 504 N.E.2d 630. But in the *Mazza* case, there was less incriminating evidence than in the present case. In that case, the defendant and the victim were both interested in the same woman. It could be inferred that the defendant planned to meet the victim at a local restaurant. The defendant, accompanied by a friend, Mongiello, went to the restaurant. Mongiello drove to a gasoline station next to the restaurant, and while Mongiello was getting gasoline, the defendant went to the parking lot of the restaurant. The defendant returned in approximately one and one-half minutes, said, "There's a problem," and the two men left. *Id.* at 396, 504 N.E.2d 630.

Soon after, the victim's body was found face down and covered in blood in his Jeep in the parking lot of the restaurant. He had been shot to death. The Commonwealth presented no evidence that the defendant had brought a gun to the restaurant or that the victim had one in his possession at that time. The friend did not hear a gunshot and, in fact, did not see the victim's Jeep.

At about the time the body was discovered, a police officer saw the defendant about ten feet from a fire in a market. The defendant told the police he was urinating. The next night, a detective found a "scalley cap" and a pair of wet jeans behind the market. After the assault, the defendant altered his appearance and fled to Vermont. Although he was generally known as "Tony Ramo," after the

homicide the defendant used his legal name, Antonio Mazza. *Id.* at 397-398, 504 N.E.2d 630.

*202 The court acknowledged that there was evidence of the defendant's "presence **629 at the [crime scene] together with the evidence of motive and consciousness of guilt." *Id.* at 398, 504 N.E.2d 630. But "there was no evidence that the defendant had a gun in his possession when he walked to the restaurant parking lot, nor any evidence that the victim and the defendant were there at the same time, and a lack of any proof that a gunshot had been heard." *Commonwealth v. O'Laughlin,* 63 Mass. App. Ct. 805, 821, 830 N.E.2d 222 (2005). Thus, the court concluded that the evidence was insufficient "to identify the defendant as the perpetrator." *Commonwealth v. Mazza, supra* at 399, 504 N.E.2d 630.

Although there are similarities between the *Mazza* case and the present one, here the Commonwealth presented more evidence linking the defendant to the assault. The evidence of motive and opportunity are similar in the two cases. But in the instant case we have evidence of means as well (the defendant's aluminum bat, hidden under the leaves outside the complex) and significantly stronger evidence of consciousness of guilt (lies to the police about being asleep at the time of the assault, varying versions of how he was awakened, his lack of concern when he was told about the assault, reluctance and agitation about police interviews, and the wiping of the red stain in his apartment when the police showed interest in it). That the defendant was found, in the immediate aftermath of the crime, walking outside in the cold

clad only in his underwear would be consistent with his having disposed of bloody outer garments. The jury could find that, had the defendant gone outside to check for animals in the dumpster (as he claimed), it was implausible that he would have done so without putting on at least minimal clothing, not only for purposes of protection against the cold but also for purposes of decency. Finally, there was evidence of bruises or injuries on the defendant's face.[FN13] ***203** These factors add sufficient strength to the evidence to distinguish this case from the situation in the *Mazza* case.

> FN13. The Appeals Court considered the defendant's physical appearance, when he first spoke with the police only about twelve minutes after the attack, as detracting from the Commonwealth's case. *Commonwealth v. O'Laughlin,* 63 Mass. App. Ct. 805, 821-822, 830 N.E.2d 222 (2005). The defendant did not manifest any signs of recent physical exertion (sweat, shortness of breath, wet hair or disarray), but in the light most favorable to the Commonwealth, there was no reason why the defendant would be sweaty or short of breath twelve minutes after the incident. To the officers, he did appear "uneasy."

Our analysis differs from that of the Appeals Court in another respect. The Appeals Court apparently considered it significant that third-party culprit evidence "detracted" from the Commonwealth's case.[FN14] The Appeals Court has

**630 read too much into our cases concerning deterioration of the Commonwealth's case. *Commonwealth v. O'Laughlin, supra* at 824, 830 N.E.2d 222. As we said in *Commonwealth v. Latimore,* 378 Mass. 671, 676-677, 393 N.E.2d 370 (1979), we must consider the evidence "in its light most favorable to the Commonwealth, *notwithstanding the contrary evidence* " (emphasis supplied). "Deterioration would occur not because the defendant contradicted the Commonwealth's evidence ... but because evidence for the Commonwealth necessary to warrant submission of the case to the jury is later shown to be incredible or conclusively incorrect" (citation omitted). *Kater v. Commonwealth,* 421 Mass. 17, 20, 653 N.E.2d 576 (1995). The theory applies, for example, when reasonable doubt is created as a matter of law by evidence of the defendant's incarceration at the time of the incident. See *204 *Commonwealth v. Vaughn,* 23 Mass. App. Ct. 40, 42-43, 498 N.E.2d 1072 (1986). Thus, if the Commonwealth has presented sufficient evidence that the defendant committed the crime, the fact that the defendant has presented evidence that he did not does not affect the sufficiency of the evidence unless the contrary evidence is so overwhelming that no rational jury could conclude that the defendant was guilty. The defendant's evidence regarding a third-party culprit (the victim's husband) simply tended to contradict the Commonwealth's evidence; it did not show it to be "incredible or conclusively incorrect." *Kater v. Commonwealth, supra.* See *Commonwealth v. Pike,* 430 Mass. 317, 323, 718 N.E.2d 855 (1999) (although "evidence contradicted, and tended to undermine ... the Commonwealth's case," it did not demonstrate that

Commonwealth's evidence was "conclusively incorrect"); *Commonwealth v. Walker*, 401 Mass. 338, 343-344, 516 N.E.2d 1143 (1987) (jury free to disbelieve defendant's version; nothing "compelling" in evidence which caused Commonwealth's case to "deteriorate").

> FN14. The defense sought to portray the victim's husband, from whom she had recently separated, as the third-party culprit. The husband was aware of the wife's new address and that she was involved with another man. The victim described the husband as being "upset" but not angry about this relationship. Others said the husband alternated between being "nice" and verbally abusive. The husband testified that he was at home at the time of the assault and that he received two telephone calls just before 6 A.M. Each time his "caller ID" indicated the source of the call as the victim's apartment, but no one was on the line. He dialed the number, and a man answered. One witness thought he saw the husband's car in his workplace parking lot at approximately 6 A.M. on the morning of the attack, but a neighbor saw the husband's car parked at home at 6:20 A.M. The husband was generally cooperative with the police, but did not permit the police access to "personal" letters to his wife. Tests indicated the presumptive presence of blood on one

> of the husband's forearms on the day of the attack. On the evening of November 17, the police observed garbage bags on the floor of the husband's garage and dark clothing in a clothes dryer. Two wet towels strongly smelling of bleach were found in a plastic bag in the trunk of the husband's car. One of the towels was the same as towels found in the victim's linen closet. The husband explained that the towels smelled because he did not know how to do laundry and had used too much bleach on them. He said he brought them on a hunting trip the previous weekend and had forgotten them in the trunk. Finally, the husband kept wooden baseball bats and other athletic equipment in his garage.

The present case is akin to our recent decision in *Commonwealth v. Lao,* 443 Mass. 770, 779-780, 824 N.E.2d 821 (2005). There, the evidence indicated that the victim was assaulted between 9 and 9:30 A.M. and that her boy friend found her bleeding and unconscious shortly after 10 A.M. An acquaintance of the defendant (the victim's husband) testified to seeing the defendant walking from the crime scene between 9 and 9:30 A.M. The police spoke to the defendant that afternoon and he provided an alibi for the morning. The alibi was essentially corroborated, but allowed a narrow time frame in which the defendant could have committed the crime. The police did not locate any blood in a search of the defendant's van and

clothing and footwear impressions in the victim's apartment did not match any of the defendant's footwear. We affirmed the conviction because evidence of the defendant's motive to kill his wife and his presence at her apartment "around the approximate time of the murder" were sufficient to withstand the defendant's motion for a required finding of not guilty. *Id.* at 780, 824 N.E.2d 821. We reached this conclusion notwithstanding the claim that the Commonwealth's case rested "entirely" on one eyewitness who placed the defendant at the scene of the crime, that no forensic evidence connected the defendant to the crime, and **631 that *205 evidence of motive was weak. *Id.* at 778-780, 824 N.E.2d 821. We held that "[a]ny weaknesses in this identification were for the jury to weigh, and did not constitute grounds for a required finding of not guilty." *Id.* at 780, 824 N.E.2d 821. See *Commonwealth v. Anderson,* 396 Mass. 306, 312-313, 486 N.E.2d 19 (1985) (sufficient evidence where testimony proved defendant had access to murder weapon, was present with victim at time of shooting, was angry with victim about debt, and gave inconsistent statements to police when apprehended after fleeing).

3. *Withdrawal of consent.* The defendant contends that admission of so-called "refusal" evidence violated his right against self-incrimination. The defendant objected to the admission of this evidence. We review to determine whether there was error and, if so, whether "the conviction is sure that the error did not influence the jury, or had but very slight effect." *Commonwealth v. Alphas,* 430 Mass. 8, 13-14, 712

N.E.2d 575 n. 7 (1999), quoting *Commonwealth v. Flebotte,* 417 Mass. 348, 353, 630 N.E.2d 265 (1994). Article 12 of the Massachusetts Declaration of Rights provides that no person shall be compelled to accuse or furnish evidence against himself. Pursuant to this mandate, testimonial evidence of a defendant's refusal to comply with a police request may not be admitted against him. See *Commonwealth v. Conkey,* 430 Mass. 139, 141, 143, 714 N.E.2d 343 (1999) (error to admit evidence that defendant refused to submit to fingerprint test); *Commonwealth v. Hinckley,* 422 Mass. 261, 264, 661 N.E.2d 1317 (1996) (refusal to turn over sneakers); *Commonwealth v. McGrail,* 419 Mass. 774, 779-780, 647 N.E.2d 712 (1995) (refusal to take field sobriety test); *Commonwealth v. Lydon,* 413 Mass. 309, 314-315, 597 N.E.2d 36 (1992) (refusal to submit to hand swabbing for evidence of gunpowder residue).

The evidence complained of here is that the defendant, after initially consenting to a police search of his apartment, revoked his consent when an officer asked whether the consent included taking swabbings of a reddish stain, possibly blood, on a closet door. It would have been possible to limit the evidence to the following: the police saw the reddish stain, left to obtain a warrant, and found on their return that the stain had disappeared. In addition, the defendant said that he had removed the stain and thought it was his blood. However, this scenario would result in the jury speculating as to how the police permitted a potentially ***206** important piece of evidence to disappear. Such an editing of events destroys the thrust of the evidence and transforms it from

testimony that inculpates the defendant to evidence that leaves the police subject to a charge that they investigated in a careless manner and permitted the loss of important evidence. Given the particular configuration of evidence here, the refusal evidence is permissible. We do not, however, suggest by our conclusion any general validation of refusal evidence.[FN15]

> FN15. Here, the defendant first agreed to the search, then withdrew his consent, and finally, after he had destroyed the evidence, permitted the police to resume the search. It is the intervening action of the defendant, and his later consent, that distinguishes this situation from that in *Commonwealth v. Conkey,* 430 Mass. 139, 143, 714 N.E.2d 343 (1999).

We apply the same logic we have applied to a defendant's postarrest silence. Ordinarily, any evidence of such silence is not admissible because it is impermissible to comment on the defendant's invocation of the right to silence. See *Commonwealth v. Martinez,* 431 Mass. 168, 183, 726 N.E.2d 913 (2000). Nevertheless, we permit such evidence when it is **632 necessary in the context of the entire conversation for the limited purpose of clarifying why a police interview ended abruptly. *Commonwealth v. Farley,* 432 Mass. 153, 158, 732 N.E.2d 893 (2000). *Commonwealth v. Martinez, supra* at 183-184, 726 N.E.2d 913. *Commonwealth v. Habarek,* 402 Mass. 105, 110, 520 N.E.2d 1303 (1988). Similarly, evidence of the defendant's refusal to let the police remain in his

apartment would be impermissible, but for the circumstances in which it was offered, i.e., to explain the loss of potentially important evidence and to put the defendant's destruction of the evidence in its correct context.[FN16] In any event, even if it were error to admit this refusal evidence, the error *207 was not prejudicial. The statement by the defendant after he permitted the police to reenter his apartment that he had wiped the stain off the door and that, although he was not sure what the stain was, he thought that it was his blood, conveyed the same consciousness of guilt as the refusal testimony.

> FN16. While such evidence is allowed in context, corresponding argument is not. A prosecutor may not seek from a jury an adverse inference from exercise of a constitutional right. *Commonwealth v. Habarek,* 402 Mass. 105, 110, 520 N.E.2d 1303 (1988).

> Although not raised by the defendant, part of the Commonwealth's closing argument causes difficulty in this regard. The prosecutor stated: "Why else would he [the defendant] get concerned and wipe off a spot off [sic ] that door in his apartment after telling the police to leave." The first portion concerning wiping away the blood is clearly within the bounds of proper advocacy. However, with respect to the second portion, concerning "telling the police to leave," the defendant had a

> constitutional right to order the police out and the Commonwealth could not seek an adverse inference from testimony that the defendant did so.
>
> The latter reference could rationally be interpreted in two ways: as an improper reminder to the jury that the defendant dismissed the police from his apartment, or simply as a practical means to identify the period of time in which the defendant wiped away the blood. In context, we conclude that the prosecutor's argument was permissible, while noting that, for the reasons stated, the second portion of the remark would have been better left unsaid. Even if the argument crossed the line, which we do not decide, there was no objection, and the remark does not rise to the level of a substantial risk of a miscarriage of justice. Commonwealth v. Grandison, 433 Mass. 135, 141-142, 741 N.E.2d 25 (2001).

4. *Denial of hearing to challenge the reliability of DNA evidence.* The defendant filed a motion in limine for a voir dire, see *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Commonwealth v. Lanigan*, 419 Mass. 15, 641 N.E.2d 1342 (1994), to determine the reliability of the Commonwealth's DNA evidence. The defendant maintains that the judge's denial of the motion resulted in the jury's hearing unreliable scientific evidence regarding

DNA on the bat. "If the process or theory underlying a scientific expert's opinion lacks reliability, that opinion should not reach the trier of fact.... [T]he judge must rule first on any challenge to the validity of any process or theory underlying a proffered opinion." *Commonwealth v. Lanigan, supra* at 26, 641 N.E.2d 1342. The defendant submitted an affidavit of Dr. William Shields, a biology professor at the College of Environmental Science and Forestry of the State University of New York, who reviewed the State police laboratory's tests. Dr. Shields stated that he "agree[d]" with the laboratory's methods and conclusions that the reportable results indicated a mixture of DNA to which the defendant and victim, as well as fifty per cent of the population, could have contributed. The affidavit contested only the laboratory's threshold levels for reportable results, a matter for cross-examination. It did not **633 allege that the process was invalid. *Id.* Furthermore, the affidavit did not cite any study or criteria supporting the expert's statement regarding the threshold reporting standards of the State police laboratory.[FN17]

FN17. The defendant's expert also stated in his affidavit that he disagreed with the "threshold RFU of 75 used by the Massachusetts State Police crime Laboratory." As the judge noted, the affidavit does not even define RFU. Moreover, the fact that one person (the expert) disagrees with the threshold is hardly a basis for requiring a *Daubert-Lanigan* hearing. See *Daubert v. Merrell Dow Pharms.*,

*Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Commonwealth v. Lanigan*, 419 Mass. 15, 641 N.E.2d 1342 (1994).

The defendant also argues that the probative value of this ***208** DNA evidence was minimal and not admissible because it only demonstrated that the likelihood that any individual contributed to the mixture of DNA was one in two. The evidence was also that a male and a female could have contributed to the DNA. The probative value of the evidence is for the jury to decide.

The defendant contends further that the inconclusive nature of the test results rendered the evidence more prejudicial than probative. See *Commonwealth v. Sicari*, 434 Mass. 732, 751-752, 752 N.E.2d 684 (2001). The defendant's proposition is not supported by our case law. In *Commonwealth v. Benoit*, 382 Mass. 210, 220-221, 415 N.E.2d 818 (1981), bloodstained articles were tested and the blood was found to be type O. We stated: "Both the defendant and the victim, as well as a large segment of the world population, have type O blood.... Evidence is not rendered prejudicial merely because it is inconclusive [and] it is for the jury to determine the probative value to be accorded relevant evidence." The same principle applies here. There was no error.

5. *Admissibility of evidence of the defendant's use of drugs.* The defendant claims that the judge permitted the jury to hear overly prejudicial evidence of bad acts, specifically, that he smoked crack cocaine and sought to obtain additional

cocaine the night of the incident. Prior bad acts are admissible to show knowledge, intent, motive, opportunity, or absence of mistake or accident. See *Commonwealth v. Helfant,* 398 Mass. 214, 224, 496 N.E.2d 433 (1986); *Commonwealth v. Imbruglia,* 377 Mass. 682, 695, 387 N.E.2d 559 (1979). We review to determine whether the prejudice from such evidence outweighs its probative value; the judge's decision is accepted unless there has been clear error. *Commonwealth v. DelValle,* 443 Mass. 782, 790, 824 N.E.2d 830 (2005). The evidence of the defendant's drug abuse the night of the crime and his desperate attempt to obtain more cocaine or money for it permitted the inference that he sought to rob the victim for funds to buy additional drugs. The evidence also directly contradicted the defendant's claim to the first officers on the ***209** scene that he had been sleeping just before being awakened by screams of an animal. See *Commonwealth v. Horton,* 434 Mass. 823, 828, 753 N.E.2d 119 (2001) (no abuse of discretion to admit evidence of defendant's drug dealing and prior plan to rob bank as those acts relevant to motive behind killings). In addition, both at the time the evidence was admitted and in his final charge, the judge gave the jury careful limiting instructions about the use of this evidence.

6. *Admissibility of handwritten note.* The defendant attempted to introduce a handwritten note found in the victim's bedroom and claims that the judge's exclusion of the note violated his constitutional right to present a defense under the ****634** Sixth Amendment to the United States Constitution and art. 12. The note read: "Threat to kill him if seen in public.... Suck on his dick, blow

him fuck him your [*sic* ] a whore." The victim did not recall writing the note and denied that it was in her handwriting. Another note found in the victim's pocketbook was admittedly in her handwriting and was in evidence. The defendant is correct that expert analysis of the handwriting on the note is not necessary and that comparison to a genuine specimen by the trier of fact is accepted practice in Massachusetts. *Commonwealth v. O'Connell,* 438 Mass. 658, 662, 783 N.E.2d 417 (2003). Here, he argues, the jury could have used the handwriting on the note admittedly in the victim's writing as a standard for comparison of the disputed note to decide whether the note was written by the victim.

The defendant claims that the note was important to his defense that the estranged husband was the culprit because it contradicted testimony that the relationship between the Kotowskis was not hostile and because it tended to show that the husband had violent, homicidal thoughts. There was no error. The judge excluded the note because it was ambiguous, and we agree. Even if we assume that the victim wrote the note, there is no evidence who the speaker was and who was the subject of the speaker's venom. There was no evidence to connect the note to the victim's husband or to establish who was the object of the threat. Had the note been admitted, it would have required the jury to speculate as to its meaning and genesis. See *Commonwealth v. Gagnon,* 408 Mass. 185, 198, 557 N.E.2d 728 (1990).

***210** 7. *Instruction on intent to kill.* The defendant maintains that the judge erred in his instruction on the indictment charging armed

assault with intent to murder. The claim is that the judge failed to instruct that the Commonwealth had to prove that the defendant had a specific intent to kill the victim, not merely an intent to disable or scare off the victim. There was no objection. We review to determine whether there was error and, if so, whether it created a substantial risk of a miscarriage of justice. *Commonwealth v. Robinson,* 444 Mass. 102, 105, 825 N.E.2d 1021 (2005). The judge instructed: "Now, the third element that the Commonwealth has to prove beyond a reasonable doubt is that the defendant assaulted [the victim] and intended to kill her. By 'intent' again I mean the act of concentrating or focusing the mind for some perceptible period. Such intent requires a conscious act, with the determination of the mind to do the act. It is contemplation rather than reflex and it must precede the act. 'To kill' means to cause the death of another human being."

Given this instruction, it was unnecessary to add that the Commonwealth must prove that the defendant had more than an intent to disable or scare off the victim. It was sufficient that the judge instructed that the defendant must have the intent to kill the victim and that to kill means to cause a person's death.

8. *Motion to dismiss.* The defendant argues that the judge erroneously denied his motion to dismiss the indictments because the Commonwealth did not introduce sufficient evidence to support them and because the Commonwealth distorted the evidence by failing to present evidence of another suspect. See

*Commonwealth v. O'Dell,* 392 Mass. 445, 446-447, 450-451, 466 N.E.2d 828 (1984); *Commonwealth v. McCarthy,* 385 Mass. 160, 163, 430 N.E.2d 1195 (1982). The evidence against the defendant presented to the grand jury was essentially the same as that offered at trial. Because we have concluded that that evidence was sufficient ****635** to withstand motions for required findings, it clearly sufficed for grand jury purposes. As far as the contention that the Commonwealth did not present evidence of Kotowski as a suspect, because that evidence was not sufficient to create reasonable doubt for the jury, it cannot be said that it would have affected significantly the grand jury's result. See *Commonwealth v. Trowbridge,* 419 Mass. 750, 754, 647 N.E.2d 413 (1995); ***211** *Commonwealth v. LaVelle,* 414 Mass. 146, 150-151 & n. 2, 605 N.E.2d 852 (1993). "Prosecutors are not required in every instance to reveal all exculpatory evidence to a grand jury." *Id.* at 150, 605 N.E.2d 852, quoting *Commonwealth v. McGahee,* 393 Mass. 743, 746, 473 N.E.2d 1077 (1985).

9. *Closing argument.* The defendant claims that the prosecutor improperly argued that the defendant held a pillow on top of the victim with his right hand, in the absence of evidence that the defendant touched the pillow. The defendant then contends that defense counsel's failure to object to the improper argument was ineffective assistance of counsel creating a substantial risk of a miscarriage of justice. The defendant offers no further argument on the point and does not inform us how he was prejudiced by this alleged impropriety. His argument does not rise to the level of adequate appellate argument. Mass. R.A.P.

16(a)(4), as amended, 367 Mass. 921 (1975). Cf. *Commonwealth v. Whitford,* 16 Mass. App. Ct. 448, 452, 452 N.E.2d 262 (1983).

***Judgments affirmed.***

## APPENDIX D

**[Published at: 577 F.3d *1]**

United States Court of Appeals,
First Circuit.

Michael O'LAUGHLIN, Petitioner, Appellant,

v.

Steven O'BRIEN, Superintendent, Old Colony Correctional Center, Respondent, Appellee.

**No. 08-1010.**

* * *

Before LYNCH, Chief Judge, TORRUELLA, BALDOCK,[FN*] BOUDIN, LIPEZ and HOWARD, Circuit Judges.

FN* Of the Tenth Circuit, sitting by designation.

### ORDER OF COURT

**Entered: August 7, 2009**

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the

petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Richard Cushing
Donovan, Clerk

**LYNCH, Chief Judge, dissenting from the denial of en banc review.** Through AEDPA, Congress has narrowly limited federal court review of state criminal convictions. Specifically, federal habeas relief is now unavailable to state prisoners unless the state court adjudication of the prisoner's claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Here, a Massachusetts jury convicted petitioner Michael O'Laughlin of several charges relating to the gruesome nighttime beating of his neighbor, Annmarie Kotowski, which left her near death. The Supreme Judicial Court of Massachusetts ("SJC") unanimously upheld that conviction, *see Commonwealth v. O'Laughlin* (*O'Laughlin II*), 446 Mass. 188, 843 N.E.2d 617 (Mass.2006), reversing the intermediate state appellate court's holding that the evidence was insufficient, *see Commonwealth v. O'Laughlin* (*O'Laughlin I*), 63 Mass. App. Ct. 805, 830 N.E.2d 222 (Mass. App. Ct. 2005). The federal district court denied O'Laughlin's habeas petition.

Nonetheless, a panel of this court on federal habeas review found that the evidence against O'Laughlin was insufficient to support the conviction and held that the SJC's contrary determination was an unreasonable application of clearly established federal law. *See O'Laughlin v. O'Brien* (*O'Laughlin III* ), 568 F.3d 287 (1st Cir. 2009).

To reach this result, the panel opinion applied a sufficiency standard that is materially different from the Supreme Court's clearly established law under *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), and exceeded its narrowly defined power to review state court criminal convictions under AEDPA. Because the sufficiency standard applied by the panel has consequences well beyond this case and the panel's application of that standard to this case upsets the congressionally defined role of federal habeas review *2 in our federal system, I respectfully dissent from the denial of en banc review.

I.

Around 2:00 a.m. on November 17, 2000, Kotowski was severely beaten in her apartment by an assailant whom she could not later identify because of the memory loss she suffered as a result of the attack. The assailant nearly killed Kotowski, breaking almost every bone in her skull, as well as several in her hands. The evidence supported the prosecution's theory that Kotowski had awakened to find her assailant in the apartment and had been beaten to prevent her from identifying her

assailant. Kotowski knew O'Laughlin; indeed, she had been cool to his interest in her.

O'Laughlin had the means to perpetrate this attack. He lived only two doors down from Kotowski and, as a maintenance worker in the apartment complex, had a key to Kotowski's apartment, had been there, and knew the apartment's layout. That level of access was necessary to commit the crime because the police found no signs of forced entry into Kotowski's apartment. Additionally, the police found a weapon that could have been used in the attack-a baseball bat with O'Laughlin's name inscribed on the barrel-hidden under some leaves in the woods behind the apartment complex. Moreover, the police encountered O'Laughlin near the scene of the crime just minutes after the attack and noticed the next day that he had a cut on his face and a bruise below his left ear, which were consistent with being involved in a struggle.

O'Laughlin also had a motive. He had smoked crack cocaine in the hours before the attack and had called several drug dealers from the telephone in his apartment only minutes before the attack, desperately seeking more drugs. O'Laughlin had no money to buy more drugs that night, and he thought that Kotowski was well off from seeing her apartment. Although Kotowski's attacker took nothing from the apartment, police found her purse on the floor near the bathroom. Kotowski testified that she typically kept her purse on the inside handle of her bedroom door. The prosecution argued that Kotowski's attacker left without taking anything because, during the attack, he had heard

Kotowski's upstairs neighbor get to the phone and speak, and feared that the police were on the way. The police reenacted the upstairs neighbor's telephone call and determined that a person in Kotowski's apartment could hear that the upstairs neighbor was speaking on the phone.

O'Laughlin also demonstrated a consciousness of guilt. He appeared "uneasy and distant" when the police encountered him outside shortly after 2:00 a.m. in near-freezing temperatures wearing nothing but his boxer shorts. O'Laughlin told the police a series of lies and repeatedly shifted his story as to what he was doing on the night of the attack. When O'Laughlin encountered the police shortly after the attack, they told him they had been unable to locate unit 202, the apartment of the upstairs neighbor who had called the police. O'Laughlin, who knew that the units had recently been renumbered and that unit 202 was now unit 16, did not disclose that information to the officers. Rather, he misdirected them by changing their focus to purported animal noises he had heard coming from the dumpster, where the police then went. Finding nothing of interest in the dumpster, the police decided to leave. When the police returned to the apartment complex the next day, O'Laughlin refused to let the police swab what appeared to be a blood stain in his apartment and cleaned up the stain before allowing the police to return. And he gave a number of inconsistent, and sometimes *3 inherently incredible, statements about the events of that night.

A primary defense theory was that Kotowski's estranged husband, not the defendant, had committed the assault. The husband testified, and the jury rejected that theory.

II.

The state's petition for rehearing en banc presents what is essentially a three part argument: (1) that the panel has articulated and applied a new sufficiency of evidence test, which is not clearly established law from the Supreme Court and is, in fact, inconsistent with *Jackson;* (2) that the panel decision otherwise violates AEDPA's strictures that relief may be granted only where the state court engages in an "unreasonable application" of clearly established federal law; and (3) that the panel has, contrary to *Jackson,* failed to look to the totality of the evidence and has failed to draw all inferences in favor of the verdict as required. All three aspects of the state's petition raise significant issues of law, which in my view warrant rehearing en banc.

Before addressing the merits of the state's arguments, it is important to set forth the basic framework for our review. We owe deference to the state court proceedings on two levels. First, because O'Laughlin's core argument is to the sufficiency of the evidence, we must uphold the jury's verdict unless "it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Jackson,* 443 U.S. at 317, 99 S. Ct. 2781. In making this determination, we view the evidence in the light most favorable to the prosecution. *Id.* at 319, 99 S. Ct. 2781.

Second, we review O'Laughlin's sufficiency challenge through the lens of federal habeas review. Under the federal habeas statute, we must presume the correctness of all factual determinations made by the state court, *see* 28 U.S.C. § 2254(e)(1), and may grant the writ only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *id.* § 2254(d)(1). Under this standard, we must uphold even state court decisions that are incorrect so long as they are reasonable. *See Williams v. Taylor*, 529 U.S. 362, 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) ("For purposes of today's opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." (emphasis in original)); *see also Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable-a substantially higher threshold.").

Thus, to prevail, O'Laughlin must make a two-fold showing: (1) that no reasonable juror could have voted to convict; *and* (2) that the contrary view of the state court was not only wrong but unreasonable.

A. *The Proper Test for Assessing a Sufficiency Challenge*

The panel's opinion applied the Sixth Circuit's test for sufficiency, which holds that if the

jury's verdict rested on "circumstantial evidence ... [that] amounts to only a reasonable speculation," it must be vacated. *See O'Laughlin III,* 568 F.3d at 302 (quoting *Newman v. Metrish,* 543 F.3d 793, 796 (6th Cir. 2008), *petition for cert. filed,* 77 U.S.L.W. 3645 (U.S. May 12, 2009) (No. 08-1401)). The panel opinion opened its evaluation of the SJC's opinion by quoting from and implicitly adopting the *Newman* test. It then said that test *4 was met in this case, repeated the term "reasonable speculation," and drew heavily on *Newman,* giving it four pages of discussion.

"Reasonable speculation" is not the standard the Supreme Court has articulated to assess evidentiary sufficiency under *Jackson.* Instead, the *Jackson* standard asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319, 99 S. Ct. 2781 (emphasis in original). The term "reasonable speculation" appears nowhere in *Jackson* or in any of the Supreme Court's sufficiency jurisprudence. Indeed, until the panel's opinion in this case, the Sixth Circuit was the only circuit to use that standard.

The "reasonable speculation" standard is materially different from the *Jackson* standard in that it prohibits convictions from resting on *reasonable* inferences drawn from the evidence.[FN1] This new standard strongly disfavors circumstantial evidence,[FN2] contrary to our long-standing recognition that a criminal conviction may rest on circumstantial evidence alone. *See United*

*States v. Rodríguez-Durán*, 507 F.3d 749, 758 (1st Cir. 2007) ("[C]ircumstantial evidence alone may be sufficient to provide a basis for conviction."); *see also United States v. Downs-Moses*, 329 F.3d 253, 261 (1st Cir. 2003) ("[W]e do not favor direct evidence over circumstantial evidence, as either type of evidence may satisfactorily support a conviction.").

> FN1. The term "reasonable speculation" contains an inherent conflict. Recognizing that a conclusion rests on speculation suggests that the inferences upon which it is based are unreasonable.
>
> FN2. The dichotomy drawn by the panel between circumstantial and direct evidence is questionable. Convictions often rest on inferences which are drawn from direct testimony, as well as circumstantial evidence.

This devaluation of circumstantial evidence by a federal habeas court has sweeping implications. The government relies heavily on circumstantial evidence to prove cases where direct witness testimony about the commission of a crime is unavailable. This is particularly true in domestic and acquaintance violence prosecutions, where the victims, who often have the only direct evidence of their abusers' guilt, are left unable to testify or they recant or refuse to cooperate. *See* T. Linger, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747, 768 (2005) ("Recent evidence suggests

that 80 to 85 percent of battered women will recant at some point."). The panel's "reasonable speculation" rule, which substantially discounts the power of circumstantial evidence, jeopardizes these and other prosecutions where the only evidence of the defendant's guilt is circumstantial.

In addition to the infirmities in the substance of the "reasonable speculation" rule, the panel's use of another circuit court's precedent to grant habeas relief is troubling given AEDPA's requirement that the state court's error be measured against "clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added). Indeed, the Supreme Court has repeatedly cautioned that if it has not recognized a particular circuit court legal standard, a state court's failure to follow that standard cannot compel the grant of habeas relief. *See, e.g., Knowles v. Mirzayance*, --- U.S. ----, ----, 129 S. Ct. 1411, 1419, 173 L. Ed. 2d 251 (2009) (holding that federal habeas relief is unavailable based upon the application of "a specific legal rule that has not been squarely established by this Court."); ***5** *Carey v. Musladin*, 549 U.S. 70, 76-77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) (same).

B. *Limitations Under AEDPA*

The panel opinion's analysis of the reasonableness of the SJC's opinion substantially departed from the level of deference for the determinations of the state courts that Congress and the Supreme Court have provided the federal courts under AEDPA.[FN3] The panel opinion states

that the SJC's sufficiency determination was unreasonable because: (1) O'Laughlin's prior contacts with Kotowski were minimal; (2) the facts here "do[ ] not align" with a robbery motive; (3) the prosecution's weapon was "merely 'consistent' " with Kotowski's injuries; (4) the motive evidence here was "mere conjecture"; (5) O'Laughlin was not caught in a lie and did not flee the scene; and (6) the evidence of consciousness of guilt was "bare conjecture." *O'Laughlin III,* 568 F.3d at 306-08. At most, these examples amount to a disagreement as to the weight particular pieces of evidence should receive and the inferences to be drawn from them. But a state prisoner is not entitled to habeas relief under AEDPA merely because a federal court disagrees with the state court's assessment of the evidence. *See Williams,* 529 U.S. at 410, 120 S. Ct. 1495 (recognizing that a state court's determination is not an unreasonable application of law merely because it is erroneous). The state court's determination must be so incorrect as to be an unreasonable application of law, which is "a substantially higher threshold." *Schriro,* 550 U.S. at 473, 127 S. Ct. 1933.

> FN3. The result of this case-a federal appeals court reversing the state's highest court on the question of evidentiary sufficiency in a criminal prosecution-is also surprising given the SJC's historically favorable treatment of criminal defendants. Indeed, the SJC often extends criminal defendants greater protections than those required under the federal Constitution. *See, e.g.,*

> *Commonwealth v. Gomes*, 453 Mass. 506, 903 N.E.2d 567 (2009) (limiting the police's power to pat frisk suspected drug dealers for weapons); *Commonwealth v. Mavredakis*, 430 Mass. 848, 725 N.E.2d 169 (2000) (holding that the police have a duty to inform a criminal defendant of his lawyer's efforts to contact him).

The state's petition for rehearing argues that en banc review should be granted in this case because it is part of an emerging pattern of non-compliance with AEDPA where the federal courts of appeals have been granting habeas relief in circumstantial evidence cases. *See Newman*, 543 F.3d at 796; *see also Brown v. Farwell*, 525 F.3d 787 (9th Cir. 2008), *cert. granted sub nom, McDaniel v. Brown*, --- U.S. ----, 129 S. Ct. 1038, 173 L. Ed. 2d 468 (2009).

Having read the record before the federal court, I am convinced that the SJC's holding on the sufficiency issue was not only a reasonable application of *Jackson* but also entirely correct under the *Jackson* standard. The SJC's seventeen-page opinion shows there was a detailed review of the trial record by the justices and articulates and applies the correct constitutional standard for sufficiency of the evidence.

I start with the SJC's finding that O'Laughlin had a financial motive for breaking into the unit, which led to the attack on Kotowski. The SJC explained: "The defendant had purchased crack cocaine on two different occasions on the

evening of November 16 and had been ingesting drugs and beer all night. He had run out of both drugs and money later in the evening and was desperately seeking to obtain more drugs." *O'Laughlin II*, 843 N.E.2d at 627. In short, O'Laughlin needed money, and the prosecution put on evidence that O'Laughlin suspected Kotowski *6 was well off and a potential source of funding.

The panel opinion, however, dismissed robbery as a motive because Kotowski's assailant took nothing from the apartment. *See O'Laughlin III*, 568 F.3d at 306. But as the SJC explained, this motive was not negated by the fact that the assailant ultimately took nothing. It held that the attacker could well have been frightened off before he took anything by the sounds of the upstairs neighbor speaking with the police on the phone as the attack took place. *See O'Laughlin II*, 843 N.E.2d at 627 n.11. This explanation is quite reasonable and has evidentiary support. Indeed, a reenactment of the police phone call demonstrated that a person in Kotowski's apartment could hear the neighbor walking around upstairs and speaking on the phone. And the location where the police found Kotowski's purse also supports this theory.

The panel opinion also attempts to dismiss the SJC's finding that O'Laughlin had the means to commit the crime because he had a master key and there were no signs of forced entry by saying that others had a master key and that the victim could have let her assailant into the apartment. *See O'Laughlin III*, 568 F.3d at 302. These alternative explanations are, of course, possible. But to credit them requires that the court draw inferences

against the jury's verdict, which it may not do under *Jackson*. And in any event, these alternative theories in no way diminish the SJC's finding that O'Laughlin had the means to commit the crime.

There is no need to catalog the entire array of the panel opinion's disagreements with the SJC's rational inferences. Instead, I will focus on the panel opinion's primary disagreement with the SJC, which relates to the appropriate weight to give the evidence of O'Laughlin's consciousness of guilt. The SJC characterized this as the strongest evidence of O'Laughlin's guilt. *See O'Laughlin II*, 843 N.E.2d at 627-28. The panel opinion, however, found this evidence "minimally probative." *O'Laughlin III*, 568 F.3d at 303.

The SJC's conclusion that there was strong evidence of consciousness of guilt is both correct and entirely supported by a reasonable application of *Jackson*. O'Laughlin gave the police a series of differing accounts as to his activities that night, which a jury could easily conclude were untrue and implausible. The jury could reasonably infer the following. When the police first encountered O'Laughlin after 2:00 a.m. outside in his boxer shorts in near-freezing weather,[FN4] O'Laughlin appeared "uneasy and distant" and lied to the police by saying that he was asleep and had been awakened by the sound of screaming. When O'Laughlin was asked where the screaming was coming from after the police were unable to locate unit 202, O'Laughlin altered his position and said he thought the screaming might have been a raccoon that had gotten stuck in the dumpster and explained that he had placed a stick in the

dumpster to allow the animal to escape. This misdirection, along with O'Laughlin's failure to inform the police of the apartment complex's new unit numbering, distracted the police away from the victim's apartment.

> FN4. The prosecution argued that O'Laughlin came outside wearing only boxer shorts on such a cold night because he had stripped off his bloody clothes just before the police arrived. After the police left that night, O'Laughlin had several hours during which he could have disposed of any bloody clothing and any weapon before the police returned the next morning.

The next day, O'Laughlin gave the police a different account, saying that he had *7 been asleep but was awakened by the sound of the police cruisers arriving (not screaming) and so went out in the freezing cold nearly unclothed. He later again recharacterized his actions, claiming again to have been sleeping until he was awakened by screaming from animals (foxes or raccoons) fighting.

In fact, O'Laughlin's telephone records indicated that he had been on the phone frequently just minutes before the police arrived. His accounts that he had been sleeping were a lie. O'Laughlin later also lied in order to explain away those phone calls in a letter he sent to the building manager, saying that an intruder into his unit had placed those calls from his apartment while he slept. A jury could reasonable conclude that O'Laughlin's

shifting stories and overt lies demonstrated a strong consciousness of guilt.

Also damning are O'Laughlin's efforts to remove what he described as a blood stain from the door of his closet. When police noticed the stain and requested to take a sample, O'Laughlin withdrew his consent to have his apartment searched. After the police left, O'Laughlin wiped up the stain with his finger and saliva.

It was only when the police returned to his apartment and threatened to get a search warrant that he consented to allow the police to search his apartment again. By then, he had wiped away the stain.

O'Laughlin's explanation that his behavior was motivated by a concern that the police would discover his drug paraphernalia could be rationally rejected as entirely inconsistent with the fact of both consents. Moreover, the police assured O'Laughlin that he would not be prosecuted for any drug crimes if he voluntarily surrendered any contraband to the police, further reducing the credibility of O'Laughlin's explanation for his reluctance.

Whether a state court decision represents an unreasonable application of clearly established federal law is a difficult judgment for a federal court to make. The need for better articulation of the legal standards for making that judgment, particularly where the record is largely circumstantial, in my view, constitutes an appropriate basis on which to grant en banc review.

C. *The Panel Opinion's Method of Analysis*

More fundamentally, the panel opinion's method of analysis sets a dangerous precedent because it draws inferences against the jury's verdict and it takes a piecemeal approach to analyzing the evidence. That is, the panel opinion's approach to the sufficiency question in operation amounts to a de novo assessment of the record through which the court substitutes its own independent assessment of the record for the jury's evaluation. This sort of analysis should be foreign to an appellate court, which has access only to a cold record. And it is a particularly dangerous exercise in a case like this, where much of the prosecution's case depended on the testimony of witnesses and an assessment of the credibility of those witnesses.

Under *Jackson*, an appellate court considering a sufficiency challenge is not on an equal footing with the jury. Instead, "the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319, 99 S. Ct. 2781 (emphasis in original).

The panel opinion, however, fails to respect the role of the jury in deciding which evidence to credit and what reasonable inferences to draw from that evidence. For example, the panel opinion rejected *8 the reasonable inference that Kotowski's assailant fled before taking anything of value from the apartment because he heard her

upstairs neighbor on the telephone with the police. Instead, the panel held that "no rational juror could conclude that the placement of this phone call frightened him off given the volume and duration of Mrs. Kotowski's screams." *O'Laughlin III*, 568 F.3d at 302. Although it would be entirely permissible for a jury to resist drawing this inference, an appellate court applying the *Jackson* standard does not have the freedom to pick between competing reasonable inferences in this manner. *See, e.g., United States v. Ortiz*, 447 F.3d 28, 34 (1st Cir. 2006) (recognizing that "competing inferences are not enough to disturb the jury's verdict," even in a case where the evidence of the defendant's guilt was "entirely circumstantial").

The panel opinion's method of analysis suffers from a related defect to the extent that it dismisses pieces of evidence by treating them in isolation, instead of considering the totality of the evidence together. For example, the panel opinion resisted concluding that a reasonable jury could consider that the aluminum baseball bat that the police found in the woods twenty-five yards from Kotowski's apartment was evidence of O'Laughlin's guilt. The panel dismissed this because "any bat likely would have been consistent with her injuries" and because the upstairs neighbor had described sounds like wood hitting on wood. *O'Laughlin III*, 568 F.3d at 302. But the fact that Kotowski's injuries were consistent with being beaten with a baseball bat is only one of the facts that would have permitted a rational juror to conclude that the bat which the police found was the assailant's weapon. The panel's analysis ignores several other key facts relating to the bat, which had been found in close

proximity to the scene of the crime. O'Laughlin's name was inscribed on it, and O'Laughlin was closely tied to the crime by the prosecution's other evidence of his motive, means, and consciousness of guilt. The bat was hidden under some leaves and debris as though someone had tried to carefully conceal it. And the bat was otherwise clean, suggesting that it had not been in the woods for long and had been cleaned off.

This model of effectively performing de novo review rather than drawing inferences in favor of the verdict, if widely adopted, would have unfortunate consequences. It calls for appellate courts to make determinations that are well beyond the institutional capacity of a court to do working from a cold record. And it conflicts with the usual rules of finality, effectively giving criminal defendants multiple opportunities to make their case in the first instance. Indeed, the government is particularly prejudiced when we overreach to decide these cases on sufficiency grounds because principles of double jeopardy prevent the habeas petitioner from being retried. *See Evans v. Thompson*, 518 F.3d 1, 7 (1st Cir. 2008) ("Sometimes double jeopardy principles mean the habeas petitioner is simply released, as is done when the evidence of guilt is insufficient.").

III.

Sufficiency questions are inherently fact-bound, and so my disagreement with the panel opinion may appear, at first glance, to be a dispute over these facts with few implications beyond this case. But my concerns with the panel opinion run

far deeper than that. In my view, the panel's implicit adoption of the "reasonable speculation" standard impermissibly alters our circuit's approach to sufficiency questions, substantially disadvantaging whole categories of cases-like domestic and acquaintance violence prosecutions-where the *9 government's evidence is largely circumstantial. And the panel's approach sets a dangerous precedent to the extent that it deviates from the narrow role Congress envisioned for federal habeas review under AEDPA by substituting the federal court's own independent assessment of the facts for the state court's.

We have previously granted en banc review to address similarly important questions relating to the contours of federal habeas review, *see, e.g., McCambridge v. Hall,* 303 F.3d 24 (1st Cir. 2002) (en banc), and I would do so again here. Thus, with the greatest respect for my colleagues, I dissent from the denial of en banc review. *See United States v. Rivera,* No. 95-2186, 1996 WL 338379 (1st Cir. June 18, 1996) (Lynch, J., dissenting from the denial of en banc review).

**TORRUELLA, Circuit Judge, with LIPEZ, Circuit Judge, Concurring in the denial of en banc review.** I am forced to comment on the dissent from the denial of en banc review because it mischaracterizes the reasoning of the unanimous panel opinion, an opinion which neither articulates nor applies a sufficiency of the evidence test inconsistent with the Supreme Court's clearly established law under *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). To suggest that the panel opinion adopts "reasonable

speculation" as some sort of binding "legal rule" is incorrect. We do not even mention the term in the section where we discuss the constitutional right asserted-a section entitled "The *Jackson* Standard," *O'Laughlin v. O'Brien*, 568 F.3d 287, 300-02 (1st Cir. 2009)-and we consistently apply the *Jackson* standard to the facts of this case. When read in context, our use of the term "reasonable speculation" merely frowns upon speculative evidentiary interpretations and in no way suggests that we disfavor the use of circumstantial evidence. In fact, with respect to this latter point, we explicitly state that "direct evidence of identification is not necessary," *id.* at 301 n. 17, and quote our prior precedent affirming the use of circumstantial evidence, *id.*

In addition, the dissent mistakenly contends that the panel opinion engages in a piecemeal examination of the evidence. Our approach to deciding whether a jury could conclude that the evidence was sufficient to identify O'Laughlin as the assailant under *Jackson* is based on looking at the evidence as a whole. We begin and end our discussion of this evidence by stating that we consider the evidence in its totality. *See id.* at 302 ("Taken together, the circumstantial evidence in this case, even when drawing all reasonable inferences in favor of the prosecution, does not permit any rational jury to conclude that O'Laughlin was the assailant beyond a reasonable doubt."); *id.* at 304 ("Given the insufficiency of the evidence, circumstantial or otherwise, tying O'Laughlin to the attack, we conclude that a rational jury could not find O'Laughlin's guilt beyond a reasonable doubt."). In order to arrive at

our conclusion that the evidence in its totality is not sufficient to permit a rational jury to find O'Laughlin's guilt beyond a reasonable doubt, we necessarily had to consider the factors the SJC weighed, namely evidence supporting O'Laughlin's motive, opportunity, means, and consciousness of guilt. This is consistent with how we have dealt with sufficiency issues in the past. *See, e.g., Leftwich v. Maloney,* 532 F.3d 20, 25-27 (1st Cir. 2008).

Finally, the dissent's contention that the panel opinion engages in a *de novo* review of the record is plainly wrong. The opinion recounts the facts as presented by the SJC and holds, drawing all reasonable inferences in favor of the prosecution, that *10 the SJC was objectively unreasonable in concluding that O'Laughlin was the assailant beyond a reasonable doubt. This approach was not legal error. The bottom line is that we read the record differently than the dissent, not that we apply the wrong legal standard.

As we state in the panel opinion, we fully appreciate "the great degree of deference state court judgments are due, especially those that uphold jury verdicts," *O'Laughlin,* 568 F.3d at 300, and "the extremely high bar that must be overcome on habeas review," *id.* at 304. Despite this hurdle, however, in rare instances there are fact-intensive cases where a state court's determination as to guilt beyond a reasonable doubt is so incorrect as to be objectively unreasonable. A unanimous panel agreed that this is such a case.[FN1] With the utmost respect to our dissenting colleague, the en banc

court is correct in its decision to deny the petition for rehearing.

> FN1. We also note that the Massachusetts Appeals Court, while admittedly applying a different standard on direct review, overturned O'Laughlin's conviction, concluding that there was insufficient evidence to support the jury's verdict.

# APPENDIX E

## STATUTORY PROVISIONS

**28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

**28 U.S.C.A. § 2254. State custody; remedies in Federal courts**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing

evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority.

Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.